Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1996

JANIS KOKOSKA, by her Guardian JOHN KOKOSKA,

Petitioner,

vs.

BRUCE M. BULLEN, Commissioner of the Division of Medical Assistance,

Respondent.

Petition for Writ of Certiorari to the Supreme Judicial Court of Massachusetts

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether 42 U.S.C. §§ 1396a(k)(1) and (2) apply to a conservator when the plain language of the statute refers only to an individual and spouse.

2. Whether the plain meaning of §§ 1396a(k)(1) and (2) that discretion is limited by the terms of the trust can be disregarded by the Massachusetts Supreme Judicial Court.

3. Whether legislative history is to be used with the effect of distorting the plain meaning of 42 U.S.C. § 1396(k)(1) and (2) and overriding the statutory language and the purpose of the statutory language.

LIST OF ALL PARTIES

The following is a list of all parties to the proceeding in the Supreme Court of the United States:

1. *Plaintiff-Petitioner:*

   Janis Kokoska, by her Guardian John Kokoska

2. *Defendant-Respondent:*

   Bruce M. Bullen, Commissioner of the
   Division of Medical Assistance

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OPINION BELOW

The opinion of the Supreme Judicial Court of Massachusetts (App., *infra*, 1a-40a) is reported at 423 Mass. 399.

JURISDICTION

The Supreme Judicial Court of Massachusetts entered its judgment August 2, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(1).

Rule 10(b) applies because a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort. Compare the instant case with *Trust Co.* v. *State ex. rel. Dep't of Human Servs.*, 825 P.2d 1295 (Okla. 1991), cert. denied, 506 U.S. 906 (1992).

In addition, the decision of the Supreme Judicial Court of Massachusetts about a question of federal law is important to many individuals whose economic situation is similar to petitioner's. Compare the instant case with *Miller* v. *Ibarra*, 746 F. Supp.19 (D. Colo. 1990) (federal court holding in regard to § 1396(a)(k) in conflict with the Massachusetts court); *Kegel* v. *State*, 113 N.M. 646, 650 (Ct. App. 1992); and *Mills* v. *Durst*, 156 Misc. 2d 676, 684-687 (N.Y. Sup. Ct. 1993).

Medicaid and Medicare are the primary systems of health care for Americans older than 65. The intersection of tort law with Medicaid eligibility is an important matter for individuals and for its aggregate economic impact. Kenneth S. Abraham and Lance

Liebman, *Private Insurance, Social Insurance and Tort Reform: Toward A New Vision of Compensation for Illness and Injury*, 93 Columbia Law Review 75, 79 (1993).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1396a(k)(1), (1986) states:

> "In the case of a medicaid qualifying trust (described in paragraph (2)), the amount from the trust deemed available to a grantor, for purposes of subsection (a)(17), is the maximum amount of payments that may be permitted under the terms of the trust to be distributed to the grantor, assuming the full exercise of discretion by the trustee or trustees for the distribution of the maximum amount to the grantor. For purposes of the previous sentence, the term `grantor' means the individual referred to in paragraph (2)".

42 U.S.C. § 1396a(k)(2), (1986) states:

> "(2) For purposes of this subsection, a `medicaid qualifying trust' is a trust, or similar legal device, established (other than by will) by an individual (or an individual's spouse) under which the individual may be the beneficiary of all or part of the payments from the trust and the distribution of such payments is determined by one or more trustees who are

permitted to exercise any discretion with respect to the distribution to the individual".

PROCEEDINGS BELOW

On August 16, 1983, John Kokoska, the legally authorized guardian for Janis Kokoska, applied for Medicaid on her behalf. There was full disclosure of the trust. The trust assets represented the proceeds of a tort action brought on Kokoska's behalf to compensate her for her injuries. Ms. Kokoska was found eligible for Medicaid on September 8, 1983 and that eligibility continued from 1983 until 1991.

The Respondent redetermined Kokoska to be eligible for Medicaid benefits in August, 1989, three years after the adoption of the Medicaid Qualifying Trust provisions of 42 U.S.C. § 1396a(k), and Kokoska was again redetermined eligible in 1990, four years after the statutory change.

The Massachusetts regulation was changed to conform with the Medicaid Qualifying Trust statute in March, 1989. Nevertheless, the redeterminations of eligibility occurred thereafter. It was not until June 1991 that her eligibility was questioned, without any intervening change of either the statute or the regulations.

Following the denial notice, the trustee of The North Chelmsford Trust sought instructions from the Massachusetts Probate and Family Court. The trustee was instructed by the court that under the terms of The North Chelmsford Trust the trustee had no discretion to

make payments that would render Kokoska ineligible to receive Medicaid benefits, and that the trustee's discretion under the terms of the trust was limited to making contributions to Kokoska which supplemented the benefits including Medicaid benefits to which Kokoska was entitled.

This determination was appealed by the Respondent to the Massachusetts Supreme Judicial Court, which upheld the Probate Court action, although noting that its decision was not determinative of Medicaid eligibility. The Supreme Judicial Court stated that the relevant language in Article 1 of the trust states that its purpose "is to provide for the *supplemental* care, comfort, health, maintenance, support, education, habilitation and welfare of the Primary Beneficiary, who is a mentally retarded person, taking into account the benefits of...assistance the Primary Beneficiary otherwise receives as a result of his or her disability...from any state or federal government or governmental agency...(hereinafter 'the Benefits')...[T]he trust estate shall be used to the maximum extent possible to *supplement* such Benefits as are received by the Primary beneficiary." (Emphasis supplied in the Supreme Judicial Court opinion of *Young* v. *Department of Public Welfare*, 416 Mass. 629, 631, 624 N.E. 2d 110 [1993]).

The first administrative hearing in the Respondent department held The North Chelmsford Trust a Medicaid Qualifying Trust and an accessible asset. The referee determined that the Probate and Family Court determination was not relevant. The referee declined to

reopen the proceeding to permit evidence of the Probate Court's determination on the petition for instructions. The referee referred to the exception for mentally retarded persons who were residents of state intermediate care facilities for the mentally retarded, which would have qualified Kokoska for an exception from Medicaid disqualification if she were an inmate of a state facility. There is no justification or reference in the opinion authorizing a different result for Kokoska, cared for at home or in an nursing home, rather than in a state facility.

The second administrative hearing dealt specifically with the issue whether Kokoska was the settlor. The referee held that the trust was deemed to be established by Kokoska with her conservator acting on her behalf. The referee determined that the Probate and Family Court judgment, evidence of which was admitted following Superior Court remand for this purpose, did not affect the decision. The decision said that Medicaid policy was that "exculpatory clauses" limitations on the maximum extent of discretion provided by the terms of the trust instrument, are ignored in determining Medicaid eligibility. These clauses were held contrary to the clear intent of the statute because they would provide an easy means of avoiding Medicaid requirements.

On consolidated appeals to the Superior Court Department of the Massachusetts Trial Court, Middlesex Division, the Superior Court reported the case without decision, for determination of the Appeals

Court of Massachusetts. On request, the Supreme Judicial Court took direct appellate review.

The instant Supreme Judicial Court judgment affirmed the Respondent's referees. Nevertheless, the Court acknowledged that the instant case presented a difficulty not present in the companion cases. The other cases involved competent individuals who established irrevocable trusts with discretionary benefits reserved to themselves. The Supreme Judicial Court opinion acknowledged the split among the states on the issue presented in this petition, citing Arizona, Arkansas, Connecticut, Hawaii, Kansas and Minnesota as holding that conservator-established court-authorized trusts are Medicaid Qualifying Trusts (MQTs), but acknowledged that Oklahoma, Colorado (United States District Court opinion), New Mexico and New York had ruled that such trusts are not MQTs. The opinion also refers to amendments making special provision for severely disabled persons, intended to respond to the possibility of loss of Medicaid eligibility for about 1200 mentally retarded individuals residing in Massachusetts.

STATEMENT OF FACTS

Petitioner, Janis Kokoska, is a 42 year old woman who is severely disabled. Ms. Kokaska is quadriplegic, blind, unable to care for herself in any way, unable to communicate, and unable to have more than minimal brain function. These conditions stem from brain damage during an appendicitis operation when she was 12 years old, in February 1965. There was a settlement

of a medical malpractice action on her behalf. The settlement proceeds were paid to her guardian. The proceeds subsequently were placed in The North Chelmsford Trust.

Ms. Kokoska's injuries require total care. Her mother, Frances Kokoska, furnished this care at home from 1965 to 1982, from April 1986 to August 1989, from January 1990 to August 1990, and from July 1991 to September 1991. These periods total more than 21 years. When Frances Kokoska became unable, for reasons of health, to provide 24-hour care for her daughter, Janis became a resident of a series of nursing homes and a hospital. Janis's brother, John Kokoska, is her guardian.

Raymond H. Young is the present trustee of the irrevocable trust on behalf of Janis K. Kokoska, dated June 28, 1983, as amended June 21, 1984, known as the North Chelmsford Trust. The North Chelmsford Trust was established under the exact language proscribed in the Client Trust Fund Program set out in the Memorandum of Superintendence issued by Justice Wilkins of the Massachusetts Supreme Judicial Court. The North Chelmsford Trust was authorized by a decree of the Middlesex Probate and Family Court dated September 28, 1983, Docket No. 471638.

Kokoska applied to the Department of Public Welfare for Medicaid benefits, with full disclosure of the trust and its funding, and was deemed eligible for such assistance. Kokoska continued to be eligible for Medicaid from September, 1983 until July 1, 1991. The market value of the assets in The North Chelmsford

Trust was $177,835.35 as of June 28, 1991. At the present time, however, the assets in the trust have been exhausted and Kokoska is again receiving Medicaid benefits. Kokoska has endured two administrative hearings, two Superior Court appeals, the Probate Court proceeding, and two appeals to the Supreme Judicial Court.

REASONS FOR GRANTING THE WRIT

I. 42 U.S.C. §§ 1396a(k)(1) AND (2) APPLY TO A CONSERVATOR WHEN THE PLAIN LANGUAGE OF THE STATUTE REFERS ONLY TO AN INDIVIDUAL AND SPOUSE

The federal and state courts have disagreed about the interpretation of important provisions of the federal Medicaid law: 42 U.S.C.§§ 1396a(k)(1) and 1396a(k)(2). As the Massachusetts Supreme Judicial Court acknowledged (App. 36-38), its decision in this case conflicts with the highest court in Oklahoma, New York and New Mexico courts, and conflicts in principle with a federal district court. *Trust Company of Oklahoma* v. *State*, 825 P.2d 1295 (Okla. 1991), cert. denied, 506 U.S. 906 (1992); *Navarro* v. *Sullivan*, 751 F. Supp. 349 (E.D.N.Y. 1990); *Hughes* v. *Physicians Hospital*, 149 Misc. 2d 661, 566 N.Y.S. 2d 496 (Sup. Ct. 1991); *Kegel* v. *State*, 830 P.2d 563, 566 (N.M. App. 1992); *Mills* v. *Durst*, 156 Misc. 2d 676, 594 N.Y.S. 2d 537 (Sup. Ct. 1993); *Miller* v. *Ibarra*, 746 F. Supp. 19 (D. Colo. 1990).

It is essential that this Court provide guidance and clarification. The intersection of tort law, a $60 billion dollar system, with Medicaid, on which $150 billion was spent in 1995, is of great importance and can be resolved using plain meaning analysis.

At the state level, conflicting decisions are proliferating, and conflicts are developing between state and federal courts in the same state. Compare *Hughes* v. *Physicians Hospital*, 149 Misc. 2d 661, 566 N.Y. Supp. 2d 496 (1991) (not an MQT) with *Frerks* v. *Shalala*, 52 Fed. 3d 412 (2d Cir. 1995) aff'g 848 Fed. Supp. 340 (E.D.N.Y.) (an MQT).

This case is a timely opportunity to provide that guidance, since there are systemic reasons why few of the state or district court decisions receive appellate review. Moreover, the decision below is erroneous, and the issue that is addressed is important.

New Mexico, Oklahoma, Colorado and Arizona have held that irrevocable inter vivos trust authorized and restricted as to use by a supervising court, created by a conservator or guardian of an incapacitated person, with tort settlement proceeds, is in principle not self-settled and not intended to be treated as disqualifying by the language of 42 U.S.C. § 1396a (k)(2).[1]

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[1] *Kegel* v. *State*, 830 P. 2d 563, 566 (N.M. App. 1992), points out at page 566 that the only kind of trust expressly covered by 1396a(k)(2) is one created by the beneficiary or the beneficiary's spouse, and that states should not create an exclusion from eligibility for receipt of public assistance benefits unless federal law clearly authorizes it. The court acknowledged that there was also a factual issue in that there were multiple grantors, Eric Kegel and his parents, although clearly Eric was the person for whom the bulk of that tort settlement was intended. *Trust Company of Oklahoma* v.

There is no realistic prospect for resolution of this conflict without a decision by this Court. Any further decisions will simply side with one group of states, and at best shift the weight of authority in one direction or the other. Moreover, the question is rarely appealed by beneficiaries because of the costs of funding litigation. The opportunities for this Court to review the issue will be few. This case presents such an opportunity, and the Court should take it.

State, 825 P. 2d 1295 (Okla. 1991), cert. denied, 506 U.S. 906 (1992), specifically addresses the fact that the trust instrument clearly indicates its resources were intended to supplement rather than to supplant public assistance to the beneficiary. Id. at 1304. The proceeds were a settlement of the injured beneficiary's tort claim. *Miller* v. *Ibarra*, 746 F. Supp. 19, (D. Colo. 1990), stresses, at 30-31, the fact of the trust's being established by the Probate Court and the standards the Probate Court had to meet in establishing trusts with the beneficiary's funds, and that this court authority overrode the concept of what the beneficiaries could have done if they were competent. The opinion also rejects, at 31, the contention that Health Care Financing Administration (HCFA) manual guidelines should be used to say action by a legal guardian was equivalent to action by an individual, pointing out that the guidelines had never been promulgated in accordance with the Administrative Procedure Act, 5 U.S.C. § § 500 et seq.

Conflict exists among the states, having in mind the opinions in *Romo* v. *Kirshner*, 181 Ariz. 239 (Ct.App. 1995); *Thomas* v. *Arkansas Dept. of Human Services*, 319 Ark. 782, 784 (1995); *Forsyth* v. *Rowe*, 226 Conn. 818 (1993); *Barham* v. *Rubin*, 72 Haw. 308 (1991); *Williams* v. *Kansas Dept. of Social and Rehabilitation Services*, 258 Kan. 161, 166 (1995); and *Matter of Kindt*, 542 N.W. 2d 391, 196-199 (Minn. Ct. App. 1996).

Conflict even exists in cases arising in New York, depending on whether they go to the state court system, *Mills* v. *Durst*, 156 Misc. 2d 676, 594 N.Y. Supp. 2d 537 (Sup. Ct. 1993), or to the federal court system. *Frerks* v. *Shahala*, 52 Fed. 3d 412 (2d Cir. 1995), affirming 848 F. Supp. 340 (E.D.N.Y.).

II. THE PLAIN MEANING OF 42 U.S.C. §§ 1396a(k)(1) AND (2) THAT DISCRETION IS LIMITED BY THE TERMS OF THE TRUST WAS DISREGARDED BY THE MASSACHUSETTS SUPREME JUDICIAL COURT.

The Massachusetts Supreme Judicial Court did not apply the plain meaning of the statute. See Sutherland, *Statutory Construction* (1995 ed.), §2A, p.806. The plain meaning rule is "a rule that permits no deviation from the literal meaning of a statute, except as required by internal context or the need to avoid absurdity...it is often called the Golden Rule". Dickerson, *The Interpretation and Application of Statutes* (1975 ed.), p. 286.

The plain meaning of a statute "should be conclusive, except in rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intention of the drafters". *United States* v. *Ron Pair Enter, Inc.*, 489 U.S. 235, 242(1989).

42 U.S.C. Sec. 1396a(k)(1) (1986) states:

> "In the case of a medicaid qualifying trust (described in paragraph (2)), the amount from the trust deemed available to a grantor, for purposes of subsection (a)(17), is the maximum amount of payments that may be permitted under the terms of the trust to be distributed to the grantor, assuming the full exercise of discretion by the trustee or

trustees for the distribution of the maximum amount to the grantor. For purposes of the previous sentence, the term `grantor' means the individual referred to in paragraph i(2)".

42 U.S.C. § 1396a(k)(2) (1986), states:

"(2) For purposes of this subsection, a `medicaid qualifying trust' is a trust, or similar legal device, established (other than by will) by an individual (or an individual's spouse) under which the individual may be the beneficiary of all or part of the payments from the trust and the distribution of such payments is determined by one or more trustees who are permitted to exercise any discretion with respect to the distribution to the individual".

These provisions define grantor and medicaid qualifying trust. The provisions refer only to an individual and an individual's spouse. There is no reference to guardian although the instant decision imposes one.

The statutory language is plain, 42 U.S.C. § 1396a(k)(1), providing that the amount deemed available to the beneficiary is

"the *maximum amount of payment that may be permitted under the terms of the trust* to be distributed to the grantor, assuming the full exercise of discretion by the trustee or the trustees for the distribution of the maximum amount to the grantor..." (Emphasis supplied).

The plain meaning is that the terms of the trust determine the maximum amount of payment permitted. The terms of the trust limit the exercise of discretion by the trustee. The trustee's discretion can be exercised only in accordance with the terms of the trust instrument. And under the terms of The North Chelmsford Trust there is no discretion to pay for anything other than supplemental benefits.

Specifically, the trustee is not authorized to make payments for benefits available otherwise under Medicaid. The limitation of discretion under the terms of The North Chelmsford Trust was specifically set out by the Supreme Judicial Court itself in its earlier decision in *Young* v. *Department of Public Welfare*, 416 Mass. 629, 624 N.E. 2d 110 (1993), upholding a Probate Court determination that the trustee of The North Chelmsford Trust had no authority to pay anything except for supplemental benefits. Payments in excess of that limitation would be a breach of the trust and would expose the trustee to surcharge litigation. The trustee had no authority to distribute the entire trust assets.

This plain meaning of the statute was followed by the respondent for five years after the enactment of the statute, 1985-1991, during which Kokoska's eligibility under Medicaid was continued and redetermined to continue at least annually. Similarly, after Massachusetts adopted a regulation in 1989 which follows the 1986 statute, the respondent for over two years continued to redetermine Kokoska as eligible. The administrative interpretation of the statute and

regulation during this period confirms the plain meaning of the statute.

It is only the self-settled trust, "established by an individual [or spouse]...under which the individual may be the beneficiary..." which is a "medicaid qualifying trust" under 42 U.S.C. § 1396a(k)(2). As the trust is not "self-settled" by Kokoska it is not a "medicaid qualifying trust"

After recognizing the validity of the plain meaning of the rule, and the fact that the administrative interpretation from 1986 through 1991 was that the beneficiaries of the trust such as these were treated as eligible, and that this is initial, not the changed interpretation that is entitled to deference, and the fact that the 1991 change in interpretation was based on a letter from a deputy regional administrator of HCFA, never embodied in regulations which had been the subject of notice, comment and due promulgation (fn. 18, App. 19-20), the opinion below manages to make the trust disqualifying by a distorted interpretation of the terms of the statute. This interpretation (App. 20), says that the phrase "under the terms of the trust" applies not to the immediately preceding verb "permitted" but rather is to import an additional concept, not set out in the statute, that it means the maximum amount the trustee could distribute in any circumstances even though those circumstances do not exist.

This interpretation ignores the language which follows in the statue, i.e., "the maximum amount of payment that may be permitted under the terms of the

trust assuming the full exercise of discretion for the distribution of the maximum amount to the grantor." The trustee has no discretion to pay for other than supplemental benefits. *Young* v. *Department of Public Welfare, supra.*

III. THE LEGISLATIVE HISTORY IS NOT TO BE USED TO DISTORT THE PLAIN MEANING OF 42 U.S.C. §1396(k)(1) AND (2) (1986) AND NEGATE THE PURPOSE OF THE STATUTORY LANGUAGE.

The Supreme Judicial Court opinion, relies heavily on legislative history, a committee report, and distorts the plain meaning of the statute. The opinion cites, refers to, and quotes H.R. Rep. No. 265, 99th Cong. 1st sess. pt. 1, at 71-72 (1985), Committee on Energy and Commerce. (App. 18). The committee report which the opinion uses as the foundation for its approach to the case contains strong language:

> "When affluent individuals use Medicaid Qualifying Trusts and similar 'within techniques' to qualify for the program, they are diverting scarce Federal and State resources from low-income elderly and disabled individuals, and poor women and children. This is unacceptable to the Committee." Committee report at page 72.

This strong statement in legislative history appears to pervade the Supreme Judicial Court opinion and decision.

There was no reason for the Massachusetts Supreme Judicial Court to use legislative history. There is no reason to attempt to construe legislative history when the provision is clear. See *Blum* v. *Stetson*, 465 U.S. 886, 896 (1984).

However, rather than referring to legislative history, the first step must always be the plain meaning of the statute. The words used in the statute are the best expression of the purpose of the statute. Where the meaning of the statutory language is clear, there should be no resort to legislative history.

The Supreme Judicial Court opinion recognizes the difficulty of overriding the proper reading of the statute (App. 16). The opinion points out that deference to the proper reading of the statute is especially appropriate where the statute is understood to elicit reliance by knowledgeable persons drafting documents in response to it.

The limitation of the federal statute with respect to self-created trusts was a congressional response to healthy individuals who sought to be treated as impoverished by transferring their assets into trust, while retaining use of the assets through trustee discretion as is reflected in the legislative history. By contrast, there was no sheltering of assets by Kokoska, who was quadriplegic, blind, unable to communicate and with minimal brain function. She played no part in the decision to create the trust. There is no legislative

history about handicapped individuals dealing with such trusts. The financial burden of providing total care for a physically and mentally incapacitated individual is such that individual resources are soon wiped out. For example, the Supreme Judicial Court opinion (fn. 25 at App. 36) notes that Kokoska's trust had been exhausted by the time of the Supreme Judicial Court opinion. This leaves Kokoska unable to receive the benefit of supplemental care, including special equipment, physical therapy and other comforts and benefits the trust was intended to provide. Instead, the trust has been rapidly bankrupted and she has been cast upon the vagaries of public assistance. The North Chelmsford Trust was authorized and restricted as to use by a supervising court, and created by a conservator of an incapacitated person.

The North Chelmsford Trust was created to satisfy an equitable purpose determined to be appropriate by the Commonwealth, and, indeed, in accordance with guidelines established by a Memorandum by Justice Wilkins. Use of the proceeds is restricted, and the trust is subject to continuing court supervision. *Hackett* v. *Mahoney*, SJC No. 81-84 Civil, April 9, 1981, memorandum by Justice Wilkins. The purpose of the trust and the purpose of all trusts established under that memorandum was to shelter assets of retarded individuals from being consumed by Medicaid costs and to be available for supplemental purposes over and above bare minimum custodial care.

An intent to treat a court-ordered settlement fund for a permanently disabled person as "self-settled" should not lightly be imputed to Congress. Janis played no part in the decision to create the trust. Nor can her mother be considered to have been seeking to transfer financial burdens to the Medicaid system, Kokoska's mother having provided total care for Kokoska on her own and without any involvement of the Medicaid system for a total over 21 years, including for close to four years after Kokoska had been determined eligible for Medicaid benefits.

Congress may well also have considered that accident settlements are to compensate not only for basic care costs but also for the injured person's pain, suffering and incapacity. The broader issue is the relationship between the tort system and whether the tort fees or an insurer are to be the source of payment to achieve corrective justice for compensating personal injuries over and above medical expenses including loss of earning capacity, transportation, home care and intangible damages. Kenneth S. Abraham and Lance Liebman, *Private Insurance, Social Insurance, and Tort Reform: Toward a New Vision of Compensation for Illness and Injury*, 93 Col. L. Rev. 75 (1993).

This is again a policy question for the Congress to decide, and, again in OBRA 1993, Congress has acted to adopt the broader interpretation, 42 U.S.C. § 1396p (d)(2)(A), that an individual shall be considered to have established a trust if the trust is established (clause (iii)) by "[a] person, including a court or administrative body, with legal authority to act in place of or on behalf of the

individual..." But, as with the disregard of discretion limitations, the change is prospective only, applicable only to trusts established after August 10, 1993. The new standard specifically does not apply to trusts established on or before August 10, 1993 see 42 U.S.C. §1396. Thus, the change does not apply to the North Chelmsford Trust.

Reliance is of course the factor in Kokoska and in other trusts using this language. The individual planning his affairs after the 1986 MQT statute had a choice: to give outright to children, parents or others, all assets, retaining only enough to pay for care during the two-year disqualification period. An individual making such a transfer, for purposes of Medicaid qualification, might well expect that the donees would voluntarily thereafter, out of the funds, provide him benefits over and above basic Medicaid coverage. This arrangement has no doubt been followed by many people and remains unchallenged to this day by Medicaid, except to the extent of extending the disqualification period, now at three-year level for outright gifts. The same result could be obtained by use of the trust which sets forth the intent specifically, as in Kokoska and in other MQT trusts.

This is a statutory question, however, which Congress resolved in petitioner's favor. Although the OBRA law of 1993 changed the results for trusts created on August 11, 1993 or thereafter, the Massachusetts Supreme Judicial Court was wrong to refuse to apply clear statutory language to a trust established before that date.

Statutory change did come in 1993, with the adoption of OBRA 1993, 42 U.S.C. § 1396p (d)(2)(A), that an individual shall be considered to have established a trust if the trust is established by "[A] person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual..." That this was not a mere restatement of the existing law, but indeed was intended to be a change and a broadening of the prior law, is shown by the fact that the new standard specifically does not apply to trusts established on or before August 10, 1993, but only to those established on August 11, 1993 or thereafter. 42 U.S.C. § 1361(e)(2)(C). Thus, the change does not apply to the North Chelmsford Trust or to all other trusts established before August 11, 1993 by courts.

It should be remembered Kokoska's money was awarded as compensation for her pain, her suffering and her incapacity occasioned by her injury, and not for the purchase of necessaries for her. In this matter, the court is not dealing here with a disabled person who has an inheritance, but rather with a crippled and brain-destroyed individual who has a small sum of money in place of normal body and mind.

CONCLUSION

The Supreme Court of the United States should grant this petition for the reasons explained above.

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Dated: October 30, 1996

App. 1

SUPREME JUDICIAL COURT OF MASSACHUSETTS

MARY COHEN *vs.* COMMISSIONER OF THE DIVISION OF MEDICAL ASSISTANCE.

LILLIAN I. WALKER *vs.* COMMISSIONER OF THE DIVISION OF MEDICAL ASSISTANCE.

SYDNEY A. COMINS & another,[1] EXECUTORS, *vs.* COMMISSIONER OF THE DIVISION OF MEDICAL ASSISTANCE.

JOHN KOKOSKA, guardian,[2] *vs.* COMMISSIONER OF THE DIVISION OF MEDICAL ASSISTANCE.[3]

Suffolk. Barnstable. Middlesex. May 8, 1996. - August 2, 1996.

Present: LIACOS, C.J., ABRAMS, GREANEY, & FRIED, JJ.

Medicaid. Trust, Self-settled trust, Trustee's discretion, Beneficiary. *Statute*, Construction.

Discussion of the Medicaid program established in 1965 as Title XIX of the Social Security Act, 42 U.S.C. §§ 1396 et seq., and Medicaid qualifying trusts under 42 U.S.C.

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[1] Stuart Comins.

[2] Of Janis Kokoska.

[3] Effective July 16, 1993, after the filing of these actions, responsibility for the administration of the Medicaid program was transferred from the Department of Public Welfare (department), the original defendant in these cases, to the Division of Medical Assistance (division). St. 1993, c. 161. Accordingly, the division is now the defendant in these cases. Throughout this opinion we refer to the defendant as the division although the department took some of the relevant action in these cases.

§§ 1396(k) and amendments and regulations thereunder. [401-407]

Discussion of cases considering Medicaid eligibility of beneficiaries of self-settled trusts that deny the trustee any discretion to make sums available if such would render the grantor ineligible for public assistance. [407-408]

This court construed the provisions of 42 U.S.C. § 1396(k)(2), defining a Medicaid qualifying trust before the amendment effected by Pub. L. 103-66, § 13611, 107 Stat. 627 (1993), to encompass any trust established by a person (or that person's spouse) under which that person may receive any payments in the discretion of the trustees, and further, under the provisions of § 1396a(k)(1), the amount of money deemed to be available to the beneficiary is the greatest amount that the trustees in any set of circumstances might have discretion to pay out. [408-415]

A Superior Court judge correctly concluded that the amount of money available to the beneficiary of a 1983 self-settled trust for purposes of Medicaid eligibility under 42 U.S.C. § 1396a(k) was, under the terms of the trust, the full amount of the trust, where the trustee had complete discretion to pay the full amount to the beneficiary, disregarding any limitation on the trustee's discretion to make distributions that would render the beneficiary ineligible for Medicaid benefits. [415-416]

A Superior Court judge correctly concluded that the amount of money available to the beneficiaries of a 1990 trust created by one spouse for the benefit of both spouses, for purposes of their Medicaid eligibility under 42 U.S.C. § 1396a(k), was the maximum amount payable under the terms of the trust, that is, the full amount of the trust net income and principal, disregarding any limitation on the trustee's discretion by reason of the beneficiaries' institutionalization. [416-419]

A Superior Court judge correctly concluded that the amount of money available to the beneficiary of a 1990 self-settled trust for purposes of the settlor's Medicaid eligibility under 42 U.S.C. § 1396a(k) was, under the terms of the trust, the full amount of interest and principal, disregarding any limitation on the trustee's discretion to distribute monies if so doing would cause the beneficiaries to be ineligible for Medicaid. [419-420]

Where the terms of a trust, settled by a conservator as authorized by the Probate Court from the proceeds of the settlement of a medical malpractice action brought on behalf of the severely disabled trust beneficiary, gave the trustee discretion to pay both income and principal to the beneficiary and limited that discretion only to ensure the beneficiary's eligibility for public assistance, the trust was properly considered a Medicaid qualifying trust; the amount deemed available to the beneficiary for purposes of Medicaid eligibility under 42 U.S.C. § 1396a(k) was the full amount of the trust. [420-424]

CIVIL ACTIONS commenced in the Superior Court Department on April 7, 1992, and November 24, 1993.

After consolidation, the cases were reported to the Appeals Court by *Paul A. Chernoff,* J., on a statement of agreed facts. The Supreme Judicial Court granted a request for direct review.

CIVIL ACTION commenced in the Superior Court Department on May 4, 1993.

The case was heard by *Cortland A. Mathers,* J., on motions for judgment on the pleadings.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

CIVIL ACTION commenced in the Superior Court Department on November 12, 1993.

The case was heard by *Julian T. Houston*, J., on motions for summary judgment.

The Supreme Judicial Court granted an application for direct appellate review.

CIVIL ACTION commenced in the Superior Court Department on March 25, 1994.

The case was heard by *Charles F. Barrett*, J., on motions for summary judgment.

The Supreme Judicial Court granted an application for direct appellate review.

Raymond H. Young (Robert 0. Berger with him) for John Kokoska.

Robert M. Bonin (Mardic Marashian with him) for Sydney A.Comins & another.

Pamela E. Terry for Lillian Walker.

Donald N. Freedman (Marcia J. Glickman with him) for Mary Cohen.

Judy A. Levenson, Assistant Attorney General, for the Commissioner of the Division of Medical Assistance.

FRIED, J. These four cases raise a common issue in the administration of the Medicaid program that has recurred in virtually identical form throughout the United States. In the four cases before us, the Division of Medical Assistance (division) denied the plaintiffs' eligibility for Medicaid benefits because it deemed that the plaintiffs had available to them sufficient resources of their own. In three of the cases a Superior Court judge affirmed the division's determinations, and in the

fourth a Superior Court judge reported the case to the Appeals Court.[4] We begin by discussing the common issue, and then apply our conclusion to the several cases in turn.[5]

I

A

The Medicaid program was established in 1965 as Title XIX of the Social Security Act, 42 U.S.C. §§ 1396 et seq., to provide health care to needy persons. The program, which makes funds available to individuals and those who furnish services to them, is administered by the States, but the State programs must comply with Federal statutes and regulations in order to qualify for the Federal funds which pay for a significant part of the program. See *Harris* v. *McRae,* 448 U.S. 297, 301 (1980); *Haley* v. *Commissioner of Pub. Welfare,* 394 Mass. 466, 467-468 (1985). The issue presented in these cases arises from the wish of persons with some means, perhaps even considerable means, to preserve their assets in the face of the large medical expenses

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[4] This court granted the Cohen's and the Cominses' applications for direct appellate review. This court transferred the Walker appeal here on its own motion. A Superior Court judge reported the Kokoska case to the Appeals Court; we then granted the plaintiffs application for direct appellate review.

[5] A fifth case, *Canter* v. *Commissioner of Pub. Welfare, post* (1996), raises a distinct issue about the use of a different kind of trust in the context of Medicaid eligibility, and is decided separately.

faced particularly by elderly persons. While the Medicare program, 42 U.S.C. §§ 1395 et seq. (1994), is designed to provide medical insurance for elderly and disabled persons generally, the coverage of that program is not complete. Supplemental private insurance is expensive and rarely comprehensive, and certain expenses — particularly long-term institutional care — confront especially elderly individuals and their families with expenses that are likely to deplete their resources entirely. See generally Gordon, How to Protect Your Life Savings from Catastrophic Illness and Nursing Homes (1990). Many of those same expenses, though perhaps on a less generous scale, are covered for the indigent by Medicaid. See *Harris, supra* at 301-302.

In response, attorneys and financial advisers hit upon the device of having a person place his or her assets in trust so that those assets would provide for that person's comfort and well being, maybe even leaving something over to pass on his or her death, while creating eligibility for public assistance. See H.R. Rep. No. 265, 99th Cong., Ist Sess., pt. 1, at 71-72 (1985) (Committee on Energy and Commerce). The theory behind this maneuver was that, because the assets are in trust, they do not count as the grantor's assets and thus do not raise the grantor above the level of indigency needed to qualify for public assistance.[6]

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[6] The regulations implementing the Commonwealth's codification of the Medicaid program, G. L. c. 118E (1994 ed.), establish a modest ceiling of resources said to be "available" to an applicant above which the individual is determined not to be sufficiently

Courts in this State and elsewhere had ruled in various contexts that, if an individual settled assets in an irrevocable trust and the disposition of those assets was at the discretion of a trustee, no beneficiary of the trust would have a right to call for them, and so the assets could not be considered available to the beneficiary. See *Randolph* v. *Roberts,* 346 Mass. 578, 579-580 (1964) (creditor denied access to assets of testamentary; spendthrift trust to reimburse itself for beneficiary's welfare disability charges); *Pemberton* v. *Pemberton,* 9 Mass. App. Ct. 9, 19-20 (1980) (court cannot compel trustee to expend assets of spendthrift trust created by father to satisfy husband's arrearages and continuing support orders); *Zeoli* v. *Commissioner of Social Servs.,* 179 Conn. 83 (1979) (parent settled assets in trust for child; court holds assets not available to child for Medicaid purposes); *Tidrow* v. *Director, Missouri State Div. of Family Servs.,* 688 S.W.2d 9 (Mo. Ct. App. 1985) (same)[7]; *Hoelzer* v. *Blum,* 93 A.D.2d 605 (N.Y. 1983) (same). The parties have not cited any case in any jurisdiction that has applied this reasoning to a trust in which the grantor or settlor is also the beneficiary, a

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needy to qualify for public assistance from the program. See 106 Code Mass. Regs. § 505.110 (1991), now codified at 130 Code Mass. Regs. § 505.110 (1995) ("total value of countable assets owned by or available to persons . . . may not exceed": for one person, $2,000; for two persons, $3,000, as of July, 1995).

[7] Prior to 1986, only such assets as were actually available to a beneficiary were counted toward Medicaid eligibility. 42 U.S.C. § 1396a(a)(17)(B) (1982). The statute did not contain a separate provision concerning what is now referred to as Medicaid qualifying trusts.

so-called self-settled trust, nor have we decided such a case. Indeed, as we show below, see *infra* at 414, the law as to self-settled trusts is to the contrary. Nevertheless, individuals faced with health care costs that threatened to deplete their assets seized upon this jurisprudence as sanctioning their seeming impoverishment through self-settled trusts. Thus, a grantor: was able to qualify for public assistance without depleting his assets; could once more enjoy those assets if he no longer needed public assistance; and, if such a happy time did not come, could let them pass intact pursuant to the terms of the trust to his heirs. The grantor was able to have his cake and eat it too.

There was considerable dissatisfaction with the ensuing state of affairs. The bill containing the provisions now before this court was referred in 1985 to the House Committee on Energy and Commerce. In its report recommending passage, the committee wrote:

> "The Committee feels compelled to state the obvious. Medicaid is, and always has been, a program to provide basic health coverage to people who do not have sufficient income or resources to provide for themselves. When affluent individuals use Medicaid qualifying trusts and similar 'techniques' to qualify for the program, they are diverting scarce Federal and State resources from low-income elderly and disabled individuals, and poor women and children. This is unacceptable to the Committee."

H.R. Rep. No. 265, 99th Cong., Ist Sess., pt. 1, at 72 (1985).

The provisions, as finally enacted in 1986 and referred to here as the MQT statute, are the same in all relevant respects to those reported by the committee.[8] Compare H.R. Rep. No. 265, supra at 26-27 (Sept. 11, 1985) (committee report), with 42 U.S.C. § 1396a(k). Building on the predicate that a person's eligibility for Medicaid assistance depends on whether the resources available to that person exceed a specified maximum, the MQT statute first provides that:

> "In the case of a medicaid qualifying trust [described in paragraph (2)], the amounts from the trust deemed available to a grantor, for purposes of subsection (a)(17), is the maximum amount of payments that may be permitted under the terms of the trust to be distributed to the grantor, assuming the full exercise of discretion by the trustee or trustees for the distribution of the maximum amount to the grantor. For purposes of the previous sentence, the term 'grantor' means the individual referred to in paragraph (2)."

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[8] The Committee on Energy and Commerce indicated in its report that the MQT statute applies retroactively. See H.R. Rep. No. 265, 99th Cong., Ist Sess., pt. 1, at 73 (1985) ("Medicaid qualifying trusts that have already been established, as well as those that may be created in the future, would be subject to the [MQT statute]"). The plaintiffs do not question that such an application is appropriate.

42 U.S.C. § 1396a(k)(1). Subsection (2) then goes on to define the term "medicaid qualifying trust":

> "(2) For purposes of this subsection, a 'medicaid qualifying trust' is a trust, or similar legal device, established (other than by will) by an individual (or an individual's spouse) under which the individual may be the beneficiary of all or part of the payments from the trust and the distribution of such payments is determined by one or more trustees who are permitted to exercise any discretion with respect to the distribution to the individual."[9]

The rest of the House Committee report as well as later items of legislative history provide no further explanation or clarification of the terms in the MQT statute.[10] Effective April 1, 1989, the division amended its regulations to incorporate the required implementation of this statutory change. See 106 Code

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[9] Subsection (3) provides that "[t]his subsection shall apply, without regard to - (A) whether or not the medicaid qualifying trust is irrevocable or is established for purposes other than to enable a grantor to qualify for medical assistance under this title; or (B) whether or not the discretion described in paragraph (2) is actually exercised." 42 U.S.C. § 1396a(k)(3).

[10] The State Medicaid Manual, the Federal manual that provides interpretive guidance to the States, and the Massachusetts Medical Assistance Procedures Handbook, distributed to those who determine Medicaid eligibility for the division, do not provide any further illumination on this issue.

Mass. Regs. § 505.160 (J) (1990).[11] The regulation restates in slightly different language the provisions of the Federal statute regarding MQTs.[12]

In 1993, Congress amended the provision relating, to irrevocable MQTs to provide:

> "(i) if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered resources available to the individual, and payments from that portion of the corpus or income —
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> "(I) to or from the benefit of the individual, shall be considered income of the individual, and

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[11] The MQT regulations now appear at 130 Code Mass. Regs. § 505.160 (J) and are, for all relevant purposes here, the same as the regulations codified at 106 Code Mass. Regs. § 505.160 (J).

[12] "(J) Medicaid Qualifying Trusts "(1) Requirements. A Medicaid qualifying trust is a trust or similar legal device established other than by will by the applicant for or recipient of Medical Assistance or his or her spouse under which:

"(a) The applicant or recipient is a beneficiary of all or part of the payments from the trust; and

"(b) The distribution of such payments is determined by one or more trustees who are permitted to exercise any discretion with respect to the amount to be distributed to the applicant or recipient. The amount deemed available to the applicant or recipient is the maximum amount of payments that the trustee has discretion to disburse to the applicant or recipient under the terms of the trust for the applicable budget period."

> "(II) for any other purpose, shall be considered a transfer of assets by the individual subject to subsection (c); and
>
> "(ii) any portion of the trust from which, or any income on the corpus from which, no payment could under any circumstances be made to the individual shall be considered, as of the date of establishment of the trust (or, if later, the date on which payment to the individual was foreclosed) to be assets disposed by the individual for purposes of subsection (c), and the value of the trust shall be determined for purposes of such subsection by including the amount of any payments made from such portion of the trust after such date."

42 U.S.C. § 1396p(d)(3)(B).[13]

This amendment, which, unlike the MQT statute, explicitly applies only to trusts established after the effective date of the statute, see Pub. L. 103-66, § 1361 1 (e)(2)(C), 107 Stat. 627 (1993),[14] resolves in favor of

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[13] The amendment provides that subsection (d) "shall apply without regard to — (i) the purposes for which a trust is established, (ii) whether the trustees have or exercise any discretion under the trust, (iii) any restrictions on when or whether distributions may be made from the trust, or (iv) any restrictions on the use of distributions from the trust." 42 U.S.C. § 1396p(d)(2)(C).

[14] The 1993 amendment also repealed the 1986 MQT statute. Pub. L. 103-66, § 13611 (d)(1)(C), 107 Stat. 627 (1993). The

the Commonwealth beyond any possibility of argument the issue presented in these cases: if, in any circumstances any amount of money might be paid to a beneficiary, the maximum of such amount is deemed to be available to the beneficiary. The 1993 amendment does not, however, shed any light on the intentions of the earlier Congress. It may be said with equal plausibility that the 1993 amendment confirms the Commonwealth's interpretation of the MQT statute by stating it more explicitly, or that the later Congress intended a change therefore implying that some less stringent interpretation of the earlier provision was assumed. Thus, recourse to what has been called by the apt solecism "subsequent legislative history" is even more dubious than usual. See *Massachusetts Respiratory Hosp.* v. *Department of Pub. Welfare,* 414 Mass. 330, 333 n.4 (1993); *Palmer* v. *Selectmen of Marblehead,* 368 Mass. 620, 623 (1975).

B

The issue posed by these cases is simply stated, although how the authoritative materials resolve that issue has been the subject of much controversy. In each

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plaintiffs do not argue that since the 1993 amendment is prospective only and that the 1986 MQT statute is now repealed, the law in respect to pre-August 1993 trusts is as it was before the enactment of the 1986 MQT statute. The claimants are right not to make this argument, as the evident intention of Congress in 1993 was to supersede the 1986 MQT statute for trusts created after August 10, 1993, by a more stringent provision, not to loosen eligibility requirements for previous trusts.

of these cases, the grantor of an irrevocable trust, of which the grantor (or spouse) is a beneficiary and to which the grantor has transferred substantial assets, claims eligibility for Medicaid assistance because the trust, while according the trustee substantial discretion in a number of respects, explicitly seeks to deny the trustee any discretion to make any sums available to the grantor if such availability would render the grantor ineligible for public assistance. Thus, all these trusts seek to limit the trustees' discretion just insofar as the exercise of that discretion may make the grantor ineligible for public assistance. The grantors and their representatives argue that, since no funds are available by the terms of the trust if such funds would render the beneficiary ineligible for Medicaid under the provisions of the MQT statute and the implementing State regulations, the grantors' eligibility is assured. The Commonwealth argues that this device has no purpose other than to frustrate the stated purpose of Congress in enacting the MQT statute. Accordingly, from the time of the adoption of the regulations in 1989, it has undertaken to review the Medicaid eligibility of all persons who are beneficiaries of self-settled trusts and has denied eligibility to persons who benefit from trusts with provisions such as we have described.[15] The consequence of holding these persons ineligible has been to require them to spend down the resources in

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[15] Although all of these trusts were established prior to 1991 and some prior to 1986, the Commonwealth has not sought reimbursement in this action for Medicaid assistance afforded prior to the determination of ineligibility.

their trusts. Several Superior Court decisions have addressed the issue we face here today, all ruling that the trust assets are available to the grantors thereby rendering them ineligible for Medicaid assistance to the extent of such assets. Decisions in Minnesota, *Matter of Kindt,* 542 N.W.2d 391 (Minn. Ct. App. 1996), Kansas, *Williams* v. *Kansas Dep't of Social & Rehabilitation Servs.,* 258 Kan. 161, 171-173 (1995), Michigan, *Ronney* v. *Department of Social Servs.,* 210 Mich. App. 312 (1995), and Florida, *Hatcher* v. *Department of Health & Rehabilitative Servs.,* 545 So. 2d 400, 402 (Fla. Dist. Ct. App. 1989), have reached the same conclusion. Only one decision, arguably distinguishable, *Miller* v. *Ibarra,* 746 F. Supp. 19 (D. Colo. 1990), favors the trust beneficiaries.

II

The plaintiffs argue that the plain words of the statute support their position. They take as their premises that: (1) the MQT statute provides that the amount deemed available to the grantor is limited to "the maximum amount of payments that may be permitted *under the terms of the trust* to be distributed to the grantor, assuming, the full exercise of discretion by the trustee or trustees for the distribution of the maximum amount to the grantor"[16]; and (2) that, in one

[16] The division worded its regulation in a slightly different manner. See note 12, *supra.* No party to this litigation argues that the Commonwealth's regulation is intended to do more or less than the MQT statute.

way or another under the terms of these trusts, the trustees have no discretion to pay anything but benefits supplementary to, or for purposes other than those covered by, public assistance, or to make any payments that would render the grantor ineligible for public assistance. From these premises, they reason that, under the terms of the trusts, there is no discretion to pay monies that would make the grantors ineligible for assistance under the program, and that therefore the trusts assets are not available to the beneficiaries.

If this is the proper reading of the statute, it is a hard argument to overcome. See *Construction Indus. of Mass.* v. *Commissioner of Labor & Indus.*, 406 Mass. 162, 167 (1989) (when language of a statute is clear and unambiguous, plain meaning of language must be given effect). Only if the legislative history compelled a different conclusion might we depart from the plain meaning of the statute. See 2A Singer, Sutherland Statutory Construction §§ 47.37, 47.38 (5th ed. 1992) (if clerical error, court may depart from plain meaning, in order to effectuate legislative intent). Cf. *Fred C. McClean Heating Supplies, Inc.* v. *School Building Comm'n of Springfield,* 341 Mass. 322 (1960) (court would not give statute harsh and unreasonable construction where doing so would thwart legislative intent). The application of this canon of construction is especially appropriate where the statute is understood to elicit reliance by knowledgeable persons drafting documents in response to it. See *Grady* v. *Commissioner of Revenue,* 421 Mass. 374, 377 (1995) ("tax statutes are to be strictly construed in accordance

with their plain meaning"). As we have indicated, the legislative history consists of a general statement in a House report of the problem to which the statute is addressed and explanatory statements in later reports that explain nothing, at most repeating the words of the statute. Of course there is the canon that states that a literal reading of a statute is to be avoided if it makes the statute a nullity or causes it to fail of its essential purpose. See *Manning* v. *Boston Redevelopment Auth.*, 400 Mass. 444, 453 (1987); *Attorney Gen.* v. *School Comm. of Essex,* 387 Mass. 326, 336-337 (1982); *McCarthy* v. *Woburn Hous. Auth.,* 341 Mass. 5 3 9, 542 (1960), quoting *Bell* v. *Treasurer of Cambridge,* 310 Mass. 484, 489 (1941) (where construction of statute would lead to absurd and unreasonable conclusion, such a construction should not be adopted if language is fairly susceptible of a construction leading to a logical and reasonable result). But that canon too is of little help because the MQT statute read as the grantors would read it is not without effect. As we have stated, prior to 1986 some irrevocable trusts simply allowed complete discretion in the trustee without any further specification. If we read the MQT statute as the plaintiffs here propose, it would have the effect of making the full amount of the funds in such trusts subject to the trustee's discretion available to the grantor.

The Commonwealth's response takes its cue from a letter from the associate regional administrator of the health care financing administration (HCFA) in the United States Department of Health and Human

Services.[17] The Commonwealth argues that trusts of the sort in issue here do not get trust assets or income out from under the terms of the MQT statute since the purpose of the statute is to identify when, because of trustee discretion, trust assets are available to the beneficiary, while the terms of the trusts assume eligibility and define discretion so as not to disturb it. To allow such a device, the Commonwealth asserts, would "allow grantors of trusts to make their own Medicaid eligibility rules." This argument, which reappears in all the cases, is said to show that the grantors' move in these trusts is somehow illogical or at least illegitimate. See, e.g., *Williams* v. *Kansas Dep't of Social & Rehabilitation Servs.*, 258 Kan. 161, 172 (1995), quoting Forsyth *vs.* Rowe, Conn. Super. Ct. No. CV91-0396327-S (Mar. 23, 1995). There are, however, other instances in the law where instruments are specifically drafted to take advantage of available government benefits or facilities, even making explicit reference to the statutory facility which is meant to be

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[17] The health care financing administration (HCFA) is charged with the administration of the Medicaid program and its interpretive guidelines appear in the State Medicaid Manual. See *Massachusetts Hosp. Ass'n* v. *Department of Pub. Welfare*, 419 Mass. 644, 646 (1995). See also 42 U.S.C. § 1396a(a)(17)(B) (States must make determinations of availability in accordance with standards prescribed by the Department of Health and Human Services). In response to an inquiry by the division, on July 11, 1991, HCFA sent a letter to the division explaining that "exculpatory clauses," clauses of MQTs that limit "the authority of a trustee to distribute funds from a trust if such distribution would jeopardize eligibility for government programs, including Medicaid," should be disregarded.

enjoyed. It is entirely familiar, for instance, for trusts to be drafted to take advantage of the provisions in Federal estate taxation that allow assets to be passed down and enjoyed through two generations, while being subject to lesser inheritance taxes. In the case of such "generation skipping" trusts, not only may the trust specifically define the trustees' discretion in terms of retaining eligibility for the more favorable tax treatment, but this court has reformed trust documents to overcome drafting errors that might have defeated this tax-minimizing purpose. See, e.g., *Shawmut Bank* v. *Buckley,* 422 Mass. 706, 711 (1996). It might be said that this is an example of a facility which the law contemplates and thus does not seek to impede, while the trust device in issue here is a misuse of the law. Unfortunately that argument begs the question by assuming that the trusts in question frustrate the purpose of the statute, and therefore all doubts should be indulged against them. But this is just what needs to be shown.[18]

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[18] The Commonwealth urges us to give deference to the division's administrative interpretation of the statute. Although there is some merit to the argument, it is not served up in its most appetizing form in this case. First, there are no Federal or State regulations to which we may defer. The State regulations recast the words of the statute but do not address the difficulty we face here any more directly than does the statute itself. See 106 Code Mass. Regs. § 505.160(J) (1991). Likewise, the State Medicaid Manual does not expand on the words of the statute. See State Medicaid Manual, HCFA Pub. 45-3 at § 3215.3 (May, 1989). Second, the administrative interpretation which resulted in the denials of eligibility in this case dates only from 1991, before which time beneficiaries of trusts such as these were treated as

It is the text of the statute itself that leads to the conclusion that the grantors in all of these cases cannot render themselves eligible for Medicaid assistance by these devices. The clause "under the terms of the trust," on which plaintiffs place such heavy emphasis, nestles between the phrase "the maximum amount of payments that may be permitted" and "to be distributed to the grantor, assuming the full exercise of discretion by the trustee or trustees for the distribution of the maximum amount to the grantor." The clause is most naturally read to measure the maximum amount (principal or income) to be deemed available to the grantor, asking what is the greatest amount the trustees in any circumstances have discretion to disburse. The plaintiffs read the clause as not only measuring the maximum amount available to grantors but also as carrying forward to the determination of availability the circumstances in which that amount might be paid. But the clause does not say this, and making it say this is a less natural reading than the alternative. Once we have identified the maximum amount trustees in any circumstances have discretion to pay, we then proceed

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eligible. It is usually the initial not the changed interpretation of a statute that earns the kind of deference the Commonwealth would need here. See *Barnett* v. *Weinberger,* 818 F.2d 953, 960-961 n.74 (D.C. Cir. 1987), and cases cited (deference depends on consistency of interpretation). Third, the Commonwealth's interpretation is based on an interpretation announced in a letter from a regional administrator of HCFA. This Federal interpretation, if that is what it is, was never embodied in regulations which had been the subject of notice, comment, and due promulgation.

to ask whether that amount is so large as to render the grantor ineligible.

Out of an abundance of caution we mention another possible complication. The division's regulation has the following sentence:

> "The amount deemed available to the applicant or recipient is the maximum amount of payments that the trustee has discretion to disburse to the applicant or recipient under the terms of the trust for the applicable budget period."

106 Code Mass. Regs. § 505.160(J). This sentence in the regulation differs from the MQT statute it is intended to implement, in that it adds the phrase "for the applicable budget period."[19] We do not read this to mean that the extent of the discretion must be redefined during each budgetary period. Rather, the point of adding this phrase is to make clear that eligibility is calculated budgetary period by budgetary period, against the full amount of resources available assuming the maximum discretion that may be exercised at any time. Thus, if a trust gives the trustee discretion to pay out income, but only income whenever the trustee

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[19] The regulations define "budget period" as "a six-month prospective period which starts on the first day of the month of application on which the applicant would have been eligible, or on the date of service of the first bill which the recipient wishes to have covered b Medical Assistance." 106 Code Mass. Regs. § 505.300.

The State Medicaid Manual, *supra,* also refers to "budget period" in this context.

determines that the beneficiary has need for this income, the full amount of income produced by the MQT must be deemed an available asset of the beneficiary for each budgetary period. If, in a particular budgetary period, that amount together with other assets of the beneficiary exceeds the specified asset limitation ($2,000 for one person), then the beneficiary is ineligible. The point of the phrase is to require a recalculation of eligibility during each budgetary period. If the income of the trust falls below the prescribed maximum, or where principal is also deemed available, the amount of the remaining principal and income dip below that maximum, then during that budgetary period the beneficiary will not be made ineligible by reason of the trust. We do not read this phrase as requiring the division to ask during each budgetary period: what is the maximum discretion that the trustee has during each period under the terms of the trust. The reading we reject would mean that a trust which denied a trustee any discretion to pay out principal or income while a beneficiary is institutionalized would have the effect of making the principal or income unavailable during any budgetary period in which the beneficiary is institutionalized. Although the regulations can bear such a reading, we do not adopt that reading, because it differs from the MQT statute, and there is no reason to believe that it was the purpose of the regulation to be more permissive than the Federal statute with respect to MQTS.

Drawing these strands together, we interpret the statute to define what is an MQT. See 42 U.S.C. §

1396a(k)(2). And that is any trust established by a person (or that person's spouse) under which that person may receive any payments. This general definition is qualified only by the requirement that the trustees must be permitted to exercise some discretion — that is, the conditions for distribution may not be completely fixed for all circumstances. If there is an MQT, then subsection (1) of the MQT statute, with which we have been occupied, tells us how much money is to be deemed to be available. That amount is the greatest amount that the trustees in any set of circumstances might have discretion to pay out to the beneficiary. Thus, if there is a peppercorn of discretion, then whatever is the most the beneficiary might under any state of affairs receive in the full exercise of that discretion is the amount that is counted as available for Medicaid eligibility.[20]

We are confirmed in this reading by something akin to legislative history: a consideration of the source from which the legislative language appears to have been taken. See *Comey* v. *Hill,* 387 Mass. 11, 15 (1982), quoting 2A Sands, Sutherland Statutory Construction §

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[20] It is the requirement of that peppercorn of discretion that the 1993 amendment removes, providing that eligibility is to be measured by the maximum amount available under the trust under any circumstances, whether or not the trustee enjoys any discretion.

Section (2) of the MQT statute also requires some trustee discretion for a trust to count as an MQT at all. This condition is also absent from the 1993 amendment. See *Matter of Kindt,* 542 N.W.2d 391, 396 n.2 (Minn. Ct. App. 1996) (listing differences between MQT statute and 1993 amendment).

50.03, at 277-278 (4th ed. 1973) ("Words and phrases having well-defined meanings in the common law are interpreted to have the same meanings when used in statutes dealing with the same or similar subject matter as that with which they were associated at common law"). Restatement (Second) of Trusts § 156 (1959) provides:

> "Where the Settlor is a Beneficiary . . . (2) Where a person creates for his own benefit a trust for support or a discretionary trust, his transferee or creditors can reach the maximum amount which the trustee under the terms of the trust could pay to him or apply for his benefit."

The plaintiffs suggest that this provision was a likely model for the Congressional enactment, and a comparison of the purpose and the language of the provision confirms their suggestion. Section 156 of the Restatement deals with a device, like the MQT, concocted for the purpose of having your cake and eating it too: the self-settled, spendthrift trust. Under such a trust, a grantor puts his assets in a trust of which he is the beneficiary, giving his trustee discretion to pay out monies to gratify his needs but limiting that discretion so that the trustee may not pay the grantor's debts. Thus, the grantor hopes to put the trust assets beyond the reach of his or her creditors. Like the MQT statute, § 156 defeats this unappetizing maneuver by providing that, even if those assets are sought to be shielded by the discretion of a trustee, or if the trust

simply declares assets unavailable to creditors, the full amount of the monies that the trustee could in his or her discretion *"under the terms of the trust"* pay to the grantor, is the amount available to the grantor and thus to his or her creditors. Not only the courts of this State, but those of many other jurisdictions have long followed this Restatement principle. See *Ware* v. *Gulda,* 331 Mass. 68, 70 (1954); *Merchants Nat'l Bank* v. *Morrissey,* 329 Mass. 601, 605 (1953). See also Scott, Trusts § 156 n.1 (3d ed. 1967 & Supp. 1985) (compiling cases).[21] We do not innovate here, nor do we see any reason to be the least bit squeamish about interpreting the analogous Federal statute in an analogous way to accomplish an analogously just result.[22]

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[21] The plaintiffs argue that trust law supports their position and cite *Randolph* v. *Roberts,* 346 Mass. 578 (1964), and *Pemberton* v. *Pemberton,* 9 Mass. App. Ct. 9 (1980). But these cases concerned trusts established by individuals for the benefit of another. When the trust is not a self-settled trust, the language of the trust, even to the extent of a spendthrift clause, is honored. See *Randolph, supra* at 579-580. The rule, however, is the opposite for self-settled trusts, see *Ware* v. *Gulda,* 331 Mass. 68, 70 (1954), and, as we have noted, the Medicaid statute only reaches trusts created by the grantor (or spouse). See 42 U.S.C. § 1396a(k)(2). See also Restatement (Second) Trusts § 156 (2) & comment f (1959).

[22] The Restatement provides further analogies to the reading, of the MQT statute we adopt here. Restatement (Second) of Trusts § 157 (b) (1959) provides that in the case of a spendthrift trust or a trust for support — a genus of which the trusts in question here are a species — the beneficiary's interest is available to those who render necessary services or furnish necessary supplies to the beneficiary. Of course that is just what Medicaid does for the grantors in these cases. Indeed, § 339 of the Restatement

III

We now proceed to apply these generalities to the specific cases before us.

1. *Cohen.* In June, 1983, the plaintiff established the Mary Ann Cohen Trust. She was the grantor and the sole lifetime beneficiary of the irrevocable trust. The trust provides that:

> "The Trustees may, from time to time and at any time, distribute to or expend for the benefit of the beneficiary, so much of the principal and current or accumulated net income as the Trustees may in their sole discretion, determine. . . . The Trustees, however, shall have no authority whatsoever to make any payments to or for the benefit of any Beneficiary hereunder when the making of such payments shall result in the Beneficiary losing her eligibility for any public assistance or entitlement program of any kind whatever. It is the specific intent of the Grantor hereof that this Trust be used to supplement all such public assistance or

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provides roundly that "[i]f the settlor is the sole beneficiary of a trust . . . he can compel the termination of the trust, although the purposes of the trust have not been accomplished." Thus, trust attorneys are likely to be familiar with the notion that the law is anything but hospitable to arrangements such as an MQT that is designed to allow a beneficiary to have his cake and eat it too.

entitlement programs and not defeat or destroy their availability to any beneficiary hereunder."

On October 27, 1993, Cohen was admitted to a nursing home. She applied for Medicaid on November 26, 1993. The division denied her application on January 11, 1994, and a welfare appeals referee affirmed the division's denial on March 10, 1994. A Superior Court judge affirmed the division's denial of her application.

This is the pure case of a trust with no other purpose than to defeat Medicaid ineligibility standards. The trustee has complete discretion to pay income, accumulated income, and principal to the settling beneficiary, save only that the trustee has no discretion to make any payments that may result in loss of public assistance. Since there is "under the terms of the trust" the discretion to pay to the beneficiary the full amount in the trust, then that is the amount deemed available to the beneficiary for the purpose of determining Medicaid eligibility. The judgment of the Superior Court is affirmed.

2. *Comins.* On January 1, 1985, Sydney Comins established the Syly Realty Trust. The only asset in this trust was the Comins's home valued in 1993 at $323,000. On August 14, 1990, Lilyan Comins established the 1990 Lilyan and Sydney A. Comins Irrevocable Trust (Comins Trust). She named herself and Sydney as the primary beneficiaries. On September 8, 1990, Sydney transferred the property in the Syly Trust into the Comins Trust.

With respect to the income, the Comins trust provides that the beneficiaries are entitled to the full income of the Comins Trust so long as they are not institutionalized. If one beneficiary is institutionalized, the trustee is instructed to pay over all income to the noninstitutionalized beneficiary to the extent it is requested by that beneficiary, or so much, if more, as is necessary and appropriate to provide him or her with those health, medical, social, and personal benefits and services which are not otherwise available. The trustee can then pay the remainder, if any, to the institutionalized beneficiary as it is necessary and appropriate to provide for his or her health, medical, social, and personal benefits and services not otherwise available from other sources. If both beneficiaries are institutionalized, the trustee is permitted only to:

> "apply for the benefit of each of the primary beneficiaries only so much of the net income as is necessary and appropriate to provide each with those health, medical, social, and personal benefits and services, and only those benefits and services which are not otherwise available to each primary Beneficiary from other sources as or when needed for his or her welfare."

With respect to the principal, the third article of the Comins Trust instrument provides that:

> "(c) *Principal with respect to Donor.* Until the later to occur of (1) the passage of thirty

> months from the date of the establishment of this trust and (2) the date upon which either beneficiary is first institutionalized, and also thereafter during any periods of time during which the first beneficiary to be institutionalized is not then institutionalized, the Trustee shall apply on behalf of such first beneficiary so much of the principal of the Trust as is necessary and appropriate to provide him/her with those benefits and services, and only those benefits and services, which are not otherwise available to him/her from other sources as or when needed for his/her welfare.
>
> "(d) *Withdrawal of Principal.* The Trustee shall also pay over or apply for the benefit of each primary Beneficiary an amount of principal as either primary Beneficiary shall direct in writing,, not exceeding, the lesser of $5,000 or 5 % of the principal . . . provided, however, that the Trustee shall make no distributions of principal under this paragraph to a primary Beneficiary during or with respect to any time during which such primary beneficiary is institutionalized . . .

Both Sydney and Lilyan Comins were admitted to a nursing home and applied for Medicaid on July 15, 1993. The division denied their applications on August 11, 1993, reasoning that the trust was designed to shield the trust assets from being counted for Medicaid

eligibility purposes. The division denied their appeal on October 18, 1993. The Superior Court affirmed the division's denial. Lilyan died on November 26, 1993.

In this case, Lilyan created the trust for her and her husband's benefit, thus meeting one of the alternative conditions of § 1396a(k)(2) for an MQT depending on whose application the division is considering. The trustee has no discretion with respect to the noninstitutionalized beneficiaries, but must pay out to them the full income. When one or both becomes institutionalized, however, under the terms of the trust the trustee acquires limited discretion to pay out the full amount of the net income. Therefore, on the interpretation of the statute we adopt, the amount available to the beneficiaries is the maximum amount payable by the trustee disregarding any limitations on his discretion, and that is the full amount of the net income.

With respect to the principal, an analogous conclusion obtains. Paragraph (c) grants the trustee discretion to pay any amount of principal "as is necessary and appropriate . . . for his/her welfare." This discretion is limited, not in amount but by circumstances: the trustee has discretion until the later of two specified events occurs and "also thereafter during any periods of time during which the first beneficiary to be institutionalized is not then institutionalized." This provision allows for the care of the beneficiary during the thirty-month ineligibility period that another section of this statute imposes in order to preclude transfers in contemplation of

institutionalization. See 42 U.S.C. § 1396p(c)(1); 106 Code Mass. Regs. § 505.125, now codified at 130 Code Mass. Regs. § 505.125 (1995). But as we look to the trustee's discretion only to measure the amount available, we do not consider the circumstances in which trust assets are payable to a beneficiary but rather determine the amount of assets deemed available by disregarding any limitations on trustee discretion. We conclude here too that the full amount of principal must be deemed available to the Cominses. Therefore, the decision of the Superior Court judge is affirmed.[23]

We pause to note that this case illustrates the good sense of the statute, as we read it. It is true that a trust might be written to deprive the trustee of any discretion (for instance allowing the payment only of income) and that such a limitation would be respected. But the grantor of a trust has a powerful incentive to provide his trustee leeway to respond to emergency and unexpected circumstances, and whatever amounts susceptible of such leeway are attributed to the beneficiary and are counted as fully available to the grantor.

3. *Walker*. On March 24, 1990, Walker created "The Clark Family Trust," an irrevocable trust of which her

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[23] As to the principal, this might be a case in which the reading of the division's regulation we reject might make a difference in favor of the beneficiary. As we point out, however, the correct reading of the statute and regulations asks not what discretion the trustee has during the applicable budgetary period but only whether the amounts available, assuming the full exercise of discretion wherever and whenever it is granted, would yield an amount that would make the beneficiary ineligible during that period.

daughter is the trustee. Walker is the lifetime beneficiary of the trust and her three children are remainderpersons. The trust's principal is over $100,000.

Article two, paragraph A of the trust provides that the trustee "shall expend as much of the income and principal of the trust property as she in her sole discretion deems necessary for the comfortable maintenance of [Walker] subject to the restrictions contained in paragraph B of this Article." Paragraph B states:

> "The Trustee is prohibited from spending sums of interest or principal to [Walker] for her benefit for services which are otherwise available under any public entitlement program of the United States of America, the Commonwealth of Massachusetts, or any political subdivision thereof. The exercise of a discretionary power to make a distribution for [Walker's] health care, which would result in trust assets being used in substitution of public entitlement benefits is a breach of the fiduciary duties imposed on the Trustees [*sic*] under this indenture."

In July, 1991, Walker entered a nursing home. She applied for Medicaid benefits on February 26, 1993, and the division denied Walker's application. On April 20, 1993, the division denied her appeal. On January 27, 1994, a Probate and Family Court judge pursuant to a petition for instructions issued a judgment declaring

that the trust limits the trustee's discretion to distribute monies from the trust if doing so would cause Walker to become ineligible for Medicaid. Nevertheless, a Superior Court judge affirmed the division's decision.

Since the measure of the monies deemed available to the beneficiary under the terms of the trust is the amount the trustee under any circumstances has discretion to disburse, and since that discretion reaches the full amount of the principal and income, the division correctly ignored the limitation on the trustee's discretion and ruled that Walker was ineligible for Medicaid benefits. The judgment of the Superior Court is affirmed.

4. *Kokoska.* Kokoska is a severely disabled, middle aged woman. Kokoska's disabilities are a result of brain damage sustained during surgery in 1965. She received a substantial amount of money in 1968 as a result of the settlement of an ensuing malpractice action. In 1983, her conservator arranged to have the remaining proceeds placed in a trust,[24] and at that time she applied for Medicaid. The division determined that she was eligible, and she remained eligible until 1991. The relevant portions of the trust state:

"ARTICLE ONE PURPOSE OF THE TRUST

"The purpose of this Trust is to provide for the supplemental care, comfort, health, maintenance,

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[24] On September 28, 1983, a Probate Court judge authorized Kokoska's conservator to transfer all of Kokoska's property into an irrevocable trust.

support, education, habilitation and welfare of the Primary Beneficiary . . . taking into account the benefits of . . . assistance the Primary beneficiary otherwise receives as a result of his or her disability . . . from any state or federal Government or Governmental agency . . . (hereinafter 'the Benefits'). . . . [T]he trust estate shall be used to the maximum extent possible to supplement such Benefits as are received by the Primary Beneficiary . . . .

"ARTICLE TWO DISPOSITION OF INCOME

"[T]he trustee shall pay to or for the benefit of the Primary Beneficiary such portion of the net income of the Trust as in the Trustee's discretion is advisable for the Primary Beneficiary's care, comfort, health, maintenance, support, education, habilitation, and welfare. The Trustee may make payments of income on account of the Primary Beneficiary for the purchase of such property, goods, or services as from time to time are excluded from the Primary Beneficiary's eligibility for or receipt of Benefits. Without intending to be an exclusive or controlling list, such property, goods, and services may include those specified by federal and state Medicaid eligibility guidelines. . . .

"ARTICLE THREE DISPOSITION OF PRINCIPAL

> "The Trustee . . . may make payment from time to time of so much of the principal of the Trust as is advisable in the discretion of the Trustee to meet the needs of the Primary Beneficiary as set forth in article two."

In June, 1991, after the adoption of the MQT statute, the division came across Kokoska's trust and determined that it was an MQT and that the assets were available to her for purposes of the statute. Therefore, the division denied Kokoska Medicaid assistance. Kokoska appealed. In the meantime, the trustee sought instructions from the Probate Court. A Probate Court judge held that,

> "by, the terms of the trust, the trustee's discretion is limited to making distributions which are supplemental to benefits, including Medicaid benefits, to which Kokoska is entitled . . . that the trustee is not permitted to exercise any discretion if that exercise of discretion would render Kokoska ineligible to receive such benefits; and that, if Kokoska is ineligible to receive benefits for reasons other than the exercise of the trustee's discretion to make payments, then the trustee may make such payments for Kokoska's supplemental care and welfare."

Young v. *Department of Pub. Welfare,* 416 Mass. 629, 632 (1993). This court upheld the Probate Court judge's declaratory judgment but noted that the judge did not redetermine Kokoska's eligibility and that the division is not bound by the Probate Court's judgment. See *id.* at 634. Subsequently, the division denied Kokoska's appeal, and Kokoska appealed to the Superior Court. A Superior Court judge reported this case to the Appeals Court, and we granted the plaintiff's request for direct appellate review.[25]

The terms of the trust give the trustee discretion to pay both income and principal to the beneficiary for a wide and generally defined range of purposes, limiting that discretion only to assure Kokoska's eligibility for public assistance in spite of the resources otherwise available to her. Accordingly, as in the other instances we consider, the measure of the trustee's discretion is the full amount of the trust, both principal and income, and that is the amount deemed available to her for purposes of determining her Medicaid eligibility.

This case presents a difficulty not present in the other cases. Section 1396a(k)(2) of the MQT statute defines an MQT as a trust established by an individual or a spouse under which the individual may be the beneficiary of all or part of the payments from the trust. Kokoska argues that therefore, by its terms, the MQT

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[25] On April 14, 1992, a Probate Court judge modified the judgment to permit the trustee to make payments from the trust for Kokoska's support on the condition that the trustee seek reimbursement. Presently, the assets have been exhausted, and Kokoska is again receiving Medicaid assistance.

statute is not applicable to her trust, since it was not Kokoska but her conservator who established the trust and did so by a decree of the Probate Court. Decisions in other States addressing this issue favor the division's position of treating this as an MQT. See *Romo* v. *Kirschner,* 181 Ariz. 239 (Ct. App. 1995) (trust established by conservator and approved by court using proceeds from personal injury action); *Thomas* v. *Arkansas Dep't of Human Servs.,* 319 Ark. 782, 784 (1995) (trust established by guardian using settlement proceeds from workers' compensation claim); *Forsyth* v. *Rowe,* 226 Conn. 818 (1993) (individual acting through conservator); *Barham* v. *Rubin,* 72 Haw. 308 (1991) (trust established by Colorado Probate Court using settlement proceeds from personal injury action); *Williams* v. *Kansas Dep't of Social & Rehabilitation Servs.,* 258 Kan. 161, 166 (1995) (trust established by guardian using settlement proceeds from personal injury action); *Matter of Kindt,* 542 N.W.2d 391, 396-399 (Minn. Ct. App. 1996) (incompetent individual grantor of injury settlement trust fund). But cf. *Trust Co.* v. *State ex rel. Dep't of Human Servs.,* 825 P.2d 1295, 1302-1303 & n.31 (Okla. 1991), cert. denied, 506 U.S. 906 (1992) (considering MQT statute in footnote; court found dispositive that intent of trust to supplement government benefits); *Miller* v. *Ibarra,* 746 F. Supp. 19, 33-34 (D. Colo. 1990) (court's holding premised on unfairness of Colorado's "Utah Gap" rule and motivations for the creation of trust).[26] The argument,

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[26] Massachusetts participates in a Federal program that provides

which we acknowledge Kokoska's guardian is bound to make, is unavailing. In its most formalistic terms, the proceeds of the malpractice settlement were plainly her assets in that they were used for her support for approximately eighteen years before being placed in trust, cf. *Kegel* v. *State,* 113 N.M. 646, 650 (Ct. App. 1992) (beneficiary never actually had "unrestricted legal or equitable title" to the settlement proceeds because settlement paid to parents and beneficiary jointly); *Mills* v. *Durst,* 156 Misc. 2d 676, 684-687 (N.Y. Sup. Ct. 1993) (infant never had legal right to money before it became trust corpus), and both the conservator and the Probate Court were acting solely on Kokoska's behalf in establishing the trust. See *Minnehan* v. *Minnehan,* 336 Mass. 668, 670 (1958) ("A conservator, like a guardian, has only the care and management of the ward's estate, and title to it . . . never vests in him but remains in the ward"); *Ryan* v. *Brennan,* 1 Mass. App. Ct. 469, 475 (1973) (role of guardian "confined to representation of his ward"). See also State Medicaid Manual, HCFA Pub. 45-3, at § 3215.1 (May, 1989) ("A trust that is established by an individual's guardian or legal representative, acting on the individual's behalf, falls under the definition of a Medicaid qualifying trust"). In fact, the trust instrument reads: "JANIS K. KOKOSKA . . . (hereinafter the 'Settlor' or 'Primary Beneficiary') by her

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funds to bridge the "Utah Gap," under which the medically needy are not totally disqualified from Medicaid benefits if their income and assets exceed their eligibility limit. See 130 Code Mass. Regs. §§ 506.600-506.620 (1994).

conservator . . . has transferred or may transfer certain property to the Trustee hereunder."

Looking past the form, although Kokoska's situation is in some ways different from and more sympathetic than that of the other plaintiffs, in respect to the statute and its policy, her situation is the same. The MQT statute allowed for States "to waive the application of [the MQT statute] with respect to an individual where the State determines that such application would work an undue hardship," see 42 U.S.C. § 1396a(k)(4), and the 1993 amendments make special provision for certain classes of severely disabled persons, see 42 U.S.C. § 1396p(d)(4)(C).[27] But apart from these provisions, the purpose of the statute is to defeat the maneuver by which persons with assets can both retain those assets and become eligible for Medicaid. Kokoska's case fits within both the plain meaning of the statute, since Kokoska's conservator acted in all respect on her behalf and did so with funds of which Kokoska was the owner, and within its evident purpose.

Nor is our own prior decision in *Young, supra,* any impediment to such a disposition of the case. As we said, the Probate Court judge correctly interpreted the terms of the trust to limit the trustee's discretion to making only payments supplementary to public

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[27] See Pub. L. 99-509, 99th Cong., 2d Sess., reprinted in 1986 U.S. Code Cong. & Admin. News 3714 (legislative history indicating that purpose for enacting Pub. L. 99-509, § 9435, 100 Stat. 2070, was to respond to the possibility of the loss of Medicaid eligibility for about 1,200 mentally retarded individuals residing in Massachusetts).

assistance. But we also said that our decision does not determine Kokoska's Medicaid eligibility, which the division must determine according to the laws and regulation governing that program. See *id.* at 634. Thus, although the Kokoska trust limits the trustee's discretion, the MQT statute as we interpret it requires that the division disregard such a limitation when assessing availability. The statute asks only what the maximum amount of funds available to the beneficiary are in any circumstances pursuant to the exercise of the trustee's discretion. That amount, as we have seen, is the full amount of the interest and principal of the trust. The determination of the division is affirmed.

We note that while Kokoska and the other plaintiffs in these cases were ineligible for Medicaid, the trustees were in compliance with their several trusts in applying such principal and interest as the trusts make available to the support of their several beneficiaries. The modified determination of the Probate Court judge allowing the trustee to make payments for Kokoska's support was correct, and the condition that the Probate Court judge imposed requiring that the trustee seek reimbursement was prudent. By our decision today, no such reimbursement is in order. The judgments of the Superior Court are affirmed.

So ordered.

Supreme Court, U.S.
FILED
DEC 5 1996
CLERK

(2)

No. 96-700

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JANIS KOKOSKA, BY HER GUARDIAN JOHN KOKOSKA,
Petitioner,

v.

BRUCE M. BULLEN, COMMISSIONER OF THE DIVISION OF MEDICAL ASSISTANCE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

RESPONDENT'S BRIEF IN OPPOSITION

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Questions Presented

1. Whether the Massachusetts Division of Medical Assistance ("Division") correctly determined that a trust was a "Medicaid qualifying trust" pursuant to 42 U.S.C. § 1396a(k) (1986) (the "Medicaid qualifying trust statute" or "MQT" statute), where the trust was established by the trust beneficiary acting through a conservator, with funds owned by the beneficiary, and where the trustee in certain circumstances had discretion to disburse the entire trust assets to the beneficiary?

2. Whether the Division correctly determined, pursuant to the MQT statute, that the full amount of assets in a Medicaid qualifying trust were available to the trust beneficiary, for the purposes of determining the beneficiary's eligibility for Medicaid benefits, where the trustee's discretion to disburse the trust assets was limited only to the extent that such disbursement would render the beneficiary ineligible for Medicaid benefits, and where the trustee otherwise had complete discretion to disburse the entire trust assets on behalf of the beneficiary?

Parties to the Proceeding.

The parties to the proceeding in the Massachusetts Supreme Judicial Court are as follows:

Janis Kokoska, by her guardian John Kokoska, plaintiff-appellant in the Supreme Judicial Court, is the petitioner in this Court. The defendant-appellee in the Massachusetts Supreme Judicial Court is Bruce M. Bullen, the Commissioner of the Massachusetts Division of Medical Assistance, the respondent in this Court.

The *Kokoska* case and three other cases presenting similar issues concerning application of the Medicaid qualifying trust statute were argued jointly in the Supreme Judicial Court, and that court rendered one decision governing all four cases. The cases were never consolidated, however, and the parties to the other three cases therefore are not identified here.

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28 U.S.C. § 1257(l) 2

42 U.S.C. § 1396a(k) (1986) 2-3, 7, 11-12

42 U.S.C. § 1396a(k)(1) 13-14

42 U.S.C. § 1396a(k)(2) 7-8, 12

42 U.S.C. § 1396a(k)(3B) 13-14, 14 n.4

42 U.S.C. § 1396a(k)(4) 18 n.9

42 U.S.C. § 1396p(d) (1993) 6-7

42 U.S.C. § 1396p(d)(3)(B) 17 n.8

106 C.M.R. § 505.160(K)(2) (1991) 5 n.1

130 C.M.R. § 505.160(J)(3) (1995) 5 n.1

130 C.M.R. §§ 506.600-506.620 (1994) 9 n.2

Supreme Court Rule 10 6

Supreme Court Rule 10(b) 2, 6

Supreme Court Rule 10(c) 12-13

Supreme Court Rule 15 1

Miscellaneous.

Health Care Financing Administration, Department of Health and Human Services, *State Medicaid Manual* (May 1989) 12

House Committee on Energy and Commerce, H.R. Rep. No. 265, 99th Cong., 1st Sess., pt. 1 (1985) 16-17

2B Norman J. Singer, *Sutherland Statutory Construction* (5th ed. 1992) 15

Robert L. Stern et al., *Supreme Court Practice*, (7th ed. 1993) 5-6 n.1

No. 96-700

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JANIS KOKOSKA, BY HER GUARDIAN JOHN KOKOSKA,
Petitioner,

v.

BRUCE M. BULLEN, COMMISSIONER OF THE DIVISION OF MEDICAL ASSISTANCE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

RESPONDENT'S BRIEF IN OPPOSITION

Pursuant to Supreme Court Rule 15, the respondent Commissioner of the Massachusetts Division of Medical Assistance ("Commissioner") submits this brief in opposition to the petition for writ of certiorari ("Pet.") filed by the petitioner-beneficiary Janis Kokoska ("beneficiary").

Decision Below

The opinion of the Massachusetts Supreme Judicial Court, reproduced at pages App.1-App.40 of the appendix to the petition ("Pet. App."), is reported at 423 Mass. 399, 668 N.E.2d 769 (1996).

Jurisdiction

The Commissioner does not contest this Court's jurisdiction pursuant to 28 U.S.C. § 1257, but notes that jurisdiction lies under 28 U.S.C. § 1257(a), rather than 28 U.S.C. § 1257(1) as asserted at page 1 of the petition.

Contrary to the statement of jurisdiction in the petition, the reasons set forth in Supreme Court Rule 10(b) for granting review on a writ of certiorari do not apply here, as there is no conflict between the decision of the Massachusetts Supreme Judicial Court and the decision of another state court of last resort or a United States court of appeals.

Relevant Statutes

The Medicaid qualifying trust statute, 42 U.S.C. § 1396a(k) (1986), provides:

> (1) In the case of a medicaid qualifying trust (described in paragraph (2)), the amounts from the trust deemed available to a grantor, for purposes of subsection (a)(17), is the maximum amount of payments that may be permitted under the terms of the trust to be distributed to the grantor, assuming the full exercise of discretion by the trustee or trustees for the distribution of the maximum amount to the grantor. For purposes of

the previous sentence, the term "grantor" means the individual referred to in paragraph (2).

(2) For purposes of this subsection, a "medicaid qualifying trust" is a trust, or similar legal device, established (other than by will) by an individual (or an individual's spouse) under which the individual may be the beneficiary of all or part of the payments from the trust and the distribution of such payments is determined by one or more trustees who are permitted to exercise any discretion with respect to the distribution to the individual.

(3) This subsection shall apply without regard to--
(A) whether or not the medicaid qualifying trust is irrevocable or is established for purposes other than to enable a grantor to qualify for medical assistance under this title; or
(B) whether or not the discretion described in paragraph (2) is actually exercised.

Statement of the Case

This case arises from the use of *inter vivos* trusts by certain persons seeking to preserve their assets for their (or their heirs') future use while at the same time ensuring their eligibility for Medicaid benefits. In response, Congress in 1985 enacted the MQT statute, intending thereby to eliminate the practice of using such trusts to ensure Medicaid eligibility, by providing that the assets in such "Medicaid qualifying trusts" be deemed "available" resources for the purposes of determining eligibility for benefits. Following enactment of the MQT statute, the Division discontinued the beneficiary's Medicaid

benefits on the basis that the trust of which she was a beneficiary was a Medicaid qualifying trust and that the assets available to her under the trust exceeded the limits for Medicaid eligibility.

An accurate statement of the case appears in the opinion of the Supreme Judicial Court of Massachusetts at App. pp. 4-13 and 33-36. However, the petition is inaccurate in several respects.

1. The beneficiary places undue emphasis on language in the trust purporting to limit the trustee's discretion, citing a decision by the Massachusetts Probate and Family Court ("Probate Court") instructing that the trustee had no discretion to make payments that would render the beneficiary ineligible for Medicaid benefits. Pet. pp. 3-4. But as the beneficiary herself concedes, and as the Supreme Judicial Court explicitly noted both in this case and in the appeal of the determination of the Probate Court, *see Young v. Department of Pub. Welfare,* 416 Mass. 629, 634, 624 N.E.2d 110, 113 (1993), the Probate Court's decision was not determinative of the issue of Medicaid eligibility, and the Division of Medical Assistance ("Division") was not bound by the Probate Court judgment. Pet. App. p. 36.

Moreover, as the Supreme Judicial Court noted, the terms of the trust gave the trustee broad discretion to pay both trust income and principal to the beneficiary for a wide range of purposes, "limiting that discretion only to assure Kokoska's eligibility for public assistance in spite of the resources otherwise available to her." Pet. App. p. 36. Because the trustee had discretion to disburse the entire trust assets to the beneficiary in the circumstances in which her eligibility for benefits was not assumed, the Supreme Judicial Court correctly

determined that the entire trust assets should be considered available under the MQT statute.

2. The petition mischaracterizes the opinion of the Supreme Judicial Court, stating that the opinion "acknowledged the split among the states on the issue presented in this petition, citing Arizona, Arkansas, Connecticut, Hawaii, Kansas and Minnesota as holding that conservator-established court-authorized trusts are Medicaid Qualifying Trusts (MQTs), but acknowledged that Oklahoma, Colorado (United States District Court opinion), New Mexico and New York had ruled that such trusts are not MQTs." Pet. p. 6. In fact the Supreme Judicial Court cited decisions from courts in all of the foregoing jurisdictions, but referred to only two of those decisions as comparing unfavorably with the Supreme Judicial Court's conclusion that a trust established by a beneficiary acting through a conservator may be a Medicaid qualifying trust. Both of those decisions, *Miller v. Ibarra,* 746 F. Supp. 19, 33-34 (D. Colo. 1990), and *Trust Co. v. State ex rel. Dep't of Human Servs.*, 825 P.2d 1295, 1302-1303 & n.31 (Okla. 1991), *cert. denied*, 506 U.S. 906 (1992), are distinguishable, as are all of the other cases cited in the petition as "conflicting." *See Argument Section I.*[1]

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[1] The petition notes the Division's determination that the beneficiary was not a resident of an intermediate care facility for the mentally retarded and therefore did not qualify for an exception from the state regulations governing Medicaid qualifying trusts pursuant to 106 C.M.R. § 505.160(K)(2) (1991). Pet. p. 5. That regulation, now set forth at 130 C.M.R. § 505.160(J)(3) (1995), provides that trusts established prior to April 7, 1986 solely for the benefit of a resident of an intermediate care facility for the mentally retarded are excluded

Reasons for Denying the Writ

"Review on a writ of certiorari is not a matter of right, but of judicial discretion." Supreme Court Rule 10. Such a writ is to be granted "only for compelling reasons." *Id.* The purpose of certiorari jurisdiction is to permit the Court to select cases of "such gravity and general importance" as to warrant plenary review. *In re Woods*, 143 U.S. 202, 206 (1892).

Contrary to petitioner's assertion, the Supreme Judicial Court has not decided an important federal question "in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." Supreme Court Rule 10(b). The state court decisions cited in the petition do not conflict with the decision of the Supreme Judicial Court but rather are distinguishable, as is a federal case cited in the petition as conflicting and which, in any event, was decided by a district court and not by a court of appeals.

Moreover, in 1993 Congress amended the Social Security Act by repealing the MQT statute and adding new trust

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from the regulations implementing the MQT statute. While the petition appears to take issue with that determination, it is not discussed in the Argument section of the petition. The beneficiary similarly did not properly present that issue in her brief below (mentioning it only in passing in a footnote), and the opinion of the Supreme Judicial Court does not address it. For that reason (and because the issue is one of state law only), this Court lacks jurisdiction to consider the issue. *See generally* Robert L. Stern et al., *Supreme Court Practice* § 3.17, at 122 (7th ed. 1993) (collecting authorities).

provisions to 42 U.S.C. § 1396p(d) (1993). The amendment, which governs trusts established after August 10, 1993, "resolves in favor of the Commonwealth [*i.e.*, the Commissioner] beyond any possibility of argument the issue presented in these cases: if, in any circumstances any amount of money might be paid to a beneficiary, the maximum of such amount is deemed to be available to the beneficiary." Pet. App. pp. 12-13. Thus, the question presented in the petition, concerning the proper interpretation of the 1986 MQT statute (which now governs only those trusts established on or before August 10, 1993), involves an issue of limited applicability and of diminishing importance as time passes.

As the petition does not satisfy the traditional criteria which guide the Court's discretionary review, it should be denied.

I. THE SUPREME JUDICIAL COURT'S HOLDING THAT A TRUST ESTABLISHED BY A CONSERVATOR IS A MEDICAID QUALIFYING TRUST IS NOT IN CONFLICT WITH ANY DECISIONS OF OTHER STATE COURTS OF LAST RESORT OR DECISIONS OF THE UNITED STATES COURTS OF APPEALS.

The petition seeks certiorari review on the ground that the Supreme Judicial Court's decision conflicts with other decisions concerning whether a trust established by a conservator is a Medicaid qualifying trust under 42 U.S.C. § 1396a(k). Because the Supreme Judicial Court's decision is not in conflict with any of the decisions cited in the petition, review by this Court is not warranted.

1. Section 1396a(k)(2) of the Medicaid qualifying trust statute defines a Medicaid qualifying trust as a trust established

by an individual or spouse under which the individual may be the beneficiary of all or part of the payments from the trust. Pet. App. p. 36. The beneficiary reiterates her argument that the statute does not apply to her trust since it was not her, but her conservator, who established the trust, doing so pursuant to a decree of the Probate Court. Pet. pp. 8-10; Pet. App. pp. 36-37. The Supreme Judicial Court correctly rejected the argument, noting decisions in other jurisdictions that have treated trusts established by a conservator or guardian as MQTs. Pet. App. p. 37 (citing *Romo v. Kirschner*, 181 Ariz. 239, 241-243, 889 P.2d 32, 34-35 (Ct. App. 1995) (trust established by conservator and approved by court using proceeds from personal injury action held to be MQT); *Thomas v. Arkansas Dep't of Human Servs.*, 319 Ark. 782, 789, 894 S.W.2d 584, 589 (1995) (trust established by guardian using settlement proceeds from workers' compensation claim held to be in violation of state statute prohibiting MQTs); *Forsyth v. Rowe*, 226 Conn. 818, 826-828, 629 A.2d 379, 384-385 (1993) (trust established by individual acting through conservator held to be MQT); *Barham v. Rubin*, 72 Haw. 308, 309-313, 816 P.2d 965, 966-967 (1991) (trust established by probate court using settlement proceeds from personal injury action on behalf of plaintiff held to be MQT); *Williams v. Kansas Dep't of Social & Rehabilitation Servs.*, 258 Kan. 161, 166-172, 899 P.2d 452, 456-459 (1995) (trust established by guardian on behalf of beneficiary, using settlement proceeds from personal injury action, held to be MQT); *Matter of Kindt*, 542 N.W.2d 391, 396-399 (Minn. Ct. App. 1996) (trust established by guardian on behalf of incompetent individual from proceeds of personal injury settlement held to be MQT)).

Moreover, the only cases cited in the petition as conflicting with the Supreme Judicial Court's decision are distinguishable from it. *Miller v. Ibarra*, 746 F. Supp. 19 (D.

Colo. 1990), a district court decision, held that trusts approved by Colorado probate courts in favor of four elderly, mentally incompetent nursing home patients were not MQTs because they were not created by the Medicaid beneficiary. *Miller* is distinguishable because of the fact that assets remaining after the death of the beneficiaries would be transferred to the Colorado Department of Social Services, *not* to the beneficiaries' heirs, demonstrating that the trusts in *Miller* were not designed to frustrate the purpose of the MQT statute. 746 F. Supp. at 33-34. *See Forsyth v. Rowe*, 226 Conn. at 826-827 n.12, 629 A.2d at 384-385 n.12 (noting that holding in *Miller* rested on trusts' remainder provisions designating public agency rather than private heirs as residual beneficiaries); *Matter of Kindt*, 542 N.W.2d at 397 (noting that *Miller* involved exceptional circumstances in that trusts preserved remainder of trust assets for the state). [2] In contrast, under the terms of the beneficiary's

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[2] *Miller* also is distinguishable in that the holding was "premised on [the] unfairness of Colorado's 'Utah Gap' rule . . . ." Pet. App. p. 37 n.26. The "Utah Gap" refers to the disqualification of the *Miller* beneficiaries from eligibility for Medicaid payments for nursing home expenses even when their expenses far exceeded their assets. 746 F. Supp. at 20. As the Supreme Judicial Court noted, Massachusetts (unlike Colorado), participates in a federal program that provides funds to bridge the "Utah Gap," under which the medically needy are not totally disqualified from medicaid benefits if their income and assets exceed the eligibility limit. Pet. App. at pp. 37-38 n. 26. Rather, they become eligible when they incur expenses that reduce their income to the eligibility level. 130 C.M.R. §§ 506.600-506.620 (1994). Finally, in *Miller* the trustees' discretion to disburse trust assets was limited to an amount $20.00 less than the Colorado Medicaid income eligibility level,

trust, the remainder of the trust would go the beneficiary's heirs not to the state. North Chelmsford Trust, Article 4 (reproduced at Opp. App. pp. A-1 through A-2).

Trust Co. Of Oklahoma v. State ex rel. Dep't of Human Servs., 825 P.2d 1295, 1302-1303 n.31 (1991), *cert. denied*, 506 U.S. 906 (1992), merely noted in a footnote, without any analysis, that the trust in question was not an MQT because the grantor of the trust was the tortfeasor rather than the beneficiary, and the court on that basis distinguished its holding from other cases finding trusts to be MQTs. *Trust Co.* in any event is of limited precedential value due to its cursory treatment of the issue. *See, e.g., Matter of Kindt,* 542 N.W.2d at 397 (the holding in *Trust Co.* "resulted from what appears to have been a casual statement regarding a collateral issue"); *Williams v. Kansas Dep't of Social Servs. & Rehabilitation*, 258 Kan. at 171, 899 P.2d at 458-459 (failure of *Trust Co.* to address MQT issue more extensively limits its persuasiveness).

The remaining cases characterized in the petition as "conflicting" with the Supreme Judicial Court's decision also are distinguishable. *See Kegel v. State*, 113 N.M. 646, 830 P.2d 563 (Ct. App. 1992) (seven year old beneficiary never had unrestricted legal or equitable title to proceeds of tort settlement because settlement was paid to parents and child jointly, with no distinction as to which portion of settlement belonged to whom; trust therefore would not be considered MQT because record was insufficient to determine that child was person who

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746 F. Supp. at 27, so that even if the trusts were found to be MQTs, the applicants would still have been eligible for Medicaid. In contrast, the trustee in the instant case had discretion to disburse the entire trust assets. Pet. App. p. 36.

established trust); *Mills v. Durst*, 156 Misc. 2d 676, 594 N.Y.S. 2d 537 (Sup. Ct. 1993) (where child never had legal right to settlement funds before they were placed in trust, trust would not be considered self-settled under state law). Here, in contrast, the proceeds of the beneficiary's malpractice settlement "were plainly her assets in that they were used for her support for approximately eighteen years before being placed in trust . . . ." Pet. App. p. 38. Moreover, the trust itself refers to the beneficiary as the settlor, acting "by her conservator." Pet. App. pp. 38-39.[3]

2. The Supreme Judicial Court's conclusion that a trust established by a conservator acting on behalf of a beneficiary is a MQT is consistent with the purpose of the MQT statute. As the court in *Forsyth v. Rowe* explained,

> It is clear . . . from the purpose and history behind § 1396a(k) that a medicaid qualifying trust may also be "established . . . by an individual" when that individual,

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[3] *Mills v. Durst* does not conflict with *Frerks v. Shalala*, 52 F.3d 412 (2d Cir. 1995), as asserted at Pet. pp. 9-10 n.1. In *Frerks* the court rejected the plaintiffs' request to transfer settlement assets to a trust and noted that trust funds would in any event be available under the MQT statute. *Navarro v. Sullivan*, 751 F. Supp. 349 (E.D.N.Y. 1990) and *Hughes v. Physicians Hospital*, 149 Misc. 2d 661, 566 N.Y.S.2d 496 (Super. Ct. 1991) also cited in the petition, at Pet. p. 8, are not on point. *Navarro* and *Hughes* both involved a determination of eligibility for Supplemental Security Income benefits under the analogous regulations adopted by the Social Security Administration governing available "resources," but neither decision addressed or analyzed the MQT statute.

> acting through his conservator, provides the consideration for the trust. . . . It would be anomalous to construe the statute to allow a medicaid applicant to accomplish through a conservator or guardian acting on his behalf what the law prevents that applicant from doing on his own.

226 Conn. at 827-828, 629 A.2d at 384-385. *See also Williams v. Kansas Dep't of Social and Rehabilitation Servs.*, 258 Kan. at 166, 899 P.2d at 456 (implicit in the term "individual" as it appears in § 1396a(k)(2) is a person acting as the individual's legal representative where the individual is incapable of acting on his or her own); *see also* Health Care Financing Administration, Department of Health and Human Services, *State Medicaid Manual*, § 3215.1 (May 1989) ("A trust that is established by an individual's guardian or legal representative acting on the individual's behalf, falls under the definition of a Medicaid qualifying trust"), cited at Pet. App. p. 38.

II. THE SUPREME JUDICIAL COURT'S HOLDING THAT ALL OF THE TRUST ASSETS WERE AVAILABLE FOR THE PURPOSES OF DETERMINING MEDICAID ELIGIBILITY IS CONSISTENT WITH BOTH THE LANGUAGE AND PURPOSE OF 42 U.S.C. § 1396a(k), AND A 1993 AMENDMENT TO THE STATUTE MAKES THE ISSUE PRESENTED IN THE PETITION ONE OF LIMITED APPLICABILITY.

The petition does not assert any conflict between decisions of other state or federal courts and the Supreme Judicial Court's holding that all of the beneficiary's trust assets were available for the purpose of determining Medicaid eligibility. Nor does this issue involve "an important question of federal law that has not been, but should be, settled by this

Court," Supreme Court Rule 10(c). As noted above, a 1993 amendment to the MQT statute (applicable to all trusts established after August 10, 1993) clarified Congress' intention that limitations on a trustee's discretion to disburse trust assets be disregarded for purposes of determining Medicaid eligibility. Pet. App. pp. 12-13. The issue presented in the petition concerning the proper interpretation of the 1986 MQT statute (applicable only to trusts established on or before August 10, 1993) with respect to the amount of a trust beneficiary's resources deemed "available" thus is of limited applicability and does not present an important question of national significance warranting this Court's review.

1. The petition asserts that the Supreme Judicial Court's decision does not comport with the plain language of the Medicaid qualifying trust statute. Pet. pp. 11-15. The petition does not provide any persuasive authority in support of this assertion, however, but instead merely repeats the language of the statute and concludes that, because under the terms of the trust the trustee has no discretion to pay monies that would make the beneficiary ineligible for benefits, the trust assets are not "available" to the beneficiary for the purpose of assessing her eligibility. Pet. pp. 11-15. This argument, which ignores that the federal MQT statute (not the trust language) governs the determination of Medicaid eligibility, is not consistent with the plain language of the statute or its purpose.

Under the statute, the Division was required, in determining the beneficiary's "available" resources, to consider:

> the maximum amount of payments that *may be permitted* under the terms of the trust *to be distributed to the grantor, assuming the full exercise of discretion by the trustee or trustees for the distribution of the maximum*

> *amount to the grantor. . . . whether or not the [trustees'] discretion . . . is actually exercised . . . .*

42 U.S.C. § 1396a(k)(1) and (3)(B) (emphasis added). The foregoing language is read most naturally as the Supreme Judicial Court read it, *i.e.*, that the amount of assets deemed available is "the greatest amount that the trustees in any set of circumstances might have discretion to pay out to the beneficiary. Thus, if there is a peppercorn of discretion, then whatever is the most the beneficiary might under any state of affairs receive in the full exercise of that discretion is the amount that is counted as available for Medicaid eligibility." Pet. App. p. 23.[4] Applying that language to the terms of the beneficiary's trust, the trustee clearly had discretion to distribute the entire trust assets on the beneficiary's behalf in the circumstances in which she was not Medicaid-eligible. Pet. App. pp. 33-35.[5] In other words, because the limit on the

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[4] As noted above, under the MQT statute it is the *existence* of the trustee's discretion rather than the *exercise* of that discretion that is relevant to the determination of "available" assets. *See* 42 U.S.C. § 1396a(k)(3B).

[5] The Probate Court determined that under the terms of the trust "the trustee's discretion is limited to making distributions which are supplemental to benefits, including Medicaid benefits, to which Kokoska is entitled . . . that the trustee is not permitted to exercise any discretion if that exercise of discretion would render Kokoska ineligible to receive such benefits; and that, if Kokoska is ineligible to receive benefits for reasons other than the exercise of the trustee's discretion to make payments, then the trustee may make such payments for Kokoska's supplemental care and welfare." Pet. App. p. 35.

trustee's discretion was predicated on an assumption of Medicaid eligibility, and because the trustee otherwise had discretion to disburse the trust assets in their entirety, the Division properly concluded that the amount of the trust deemed "available" was the entire trust assets. Pet. App. p. 36.[6]

The interpretation of the statute given by the Health Care Financing Administration ("HCFA"), the agency within the United States Department of Health and Human Services that is charged with administration of the Medicaid program, also supports the Supreme Judicial Court's decision. In response to an inquiry from the Division, the HCFA sent a letter, dated July 11, 1991, explaining that "exculpatory clauses" (clauses of MQTS that limit "the authority of a trustee to distribute funds from a trust if such distribution would jeopardize eligibility for government programs, including Medicaid") should be disregarded for purpose of determining Medicaid eligibility. Pet. App. p. 18 n.17. This administrative interpretation of the MQT statute, although not embodied in a regulation, *see* Pet. App. p. 19-20 n.18, nevertheless is entitled to some deference. *See* 2B Norman J. Singer, *Sutherland Statutory Construction*, § 49.05 at 17-18, 20; § 49.06 at 59 (5th ed.1992). *See also Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 844-845 (1984) (agency's reasonable interpretation of

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[6] The fact that the exercise (or even the existence) of the trustee's discretion is made contingent on the beneficiary's ineligibility for Medicaid does not mean that, for the logically prior purpose of determining Medicaid eligibility, the trustee does not possess discretion or that such discretion must be ignored. A contrary holding would, in effect, allow grantors of trusts to make their own Medicaid eligibility rules.

statute is entitled to deference).[7]

2. This reading of the statute is consistent with its purpose and history. *See Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. at 842-843 (when construing a statute, court must give effect to clear Congressional intent). In enacting the MQT statute, Congress intended to eliminate the practice whereby Medicaid applicants sought to use *inter vivos* trusts to shield their assets and qualify for Medicaid benefits. The House Committee on Energy and Commerce, recommending passage of the bill containing the MQT statute, stated:

> The Committee feels compelled to state the obvious. Medicaid is, and always has been, a program to provide basic health coverage to people who do not have sufficient income or resources to provide for themselves. When affluent individuals use Medicaid qualifying trusts and similar "techniques" to qualify for the program, they are diverting scarce Federal and State resources from low-income elderly and disabled individuals, and poor women and children. This is unacceptable to the

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[7] The beneficiary erroneously suggests that the Division agreed with her interpretation of the statute for several years after its enactment in 1985, since it continued to find her eligible to receive benefits until 1991. Pet. p. 13. Rather, following enactment of the MQT statute, the Division undertook a review of all Medicaid recipient cases to redetermine eligibility based on changes in the law. As part of that review, the Division became aware of the beneficiary's trust and thereafter determined that the trust assets were available to her for purposes of the statute. Pet. App. p. 35.

Committee.

House Committee on Energy and Commerce, H.R. Rep. No. 265, 99th Cong., 1st Sess., pt. 1, at 71-72 (1985). *See also* Pet. App. pp. 6-8 (Supreme Judicial Court noted use of trust device by which a person would "place his or her assets in trust so that those assets would provide for that person's comfort and well being, maybe even leaving something over to pass on his or her death, while creating eligibility for public assistance," and discussing legislative response to this practice by enactment of MQT statute).[8]

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[8] The petition erroneously asserts that the Supreme Judicial Court ignored the plain language of the statute and placed too much reliance on legislative history, in particular the Committee Report. Pet. pp. 15-16. In fact the Supreme Judicial Court emphasized that its decision was based on the text of the statute, *see* Pet. App. p. 20 ("It is the text of the statute itself that leads to the conclusion that the grantors in all of these cases cannot render themselves eligible for Medicaid assistance by these devices.")

Moreover, in considering the legislative history of the 1986 MQT statute the Supreme Judicial Court found inconclusive the 1993 amendment clarifying that "if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual," the portion of trust corpus or income from which payment could be made "shall be considered resources available to the individual . . . ." 42 U.S.C. § 1396p(d)(3)(B); Pet. App. pp. 12-13. But while the Supreme Judicial Court declined to rely on the 1993 amendment as evidence of Congress' intent underlying the 1986 statute, the 1993 amendment merely clarified what was already existing

The beneficiary incorrectly suggests that the statute was directed only at wealthy individuals and should not be applied to disabled persons. Pet. pp. 16-17. But the petition points to nothing in the statute indicating a legislative intent to limit the reach of the statute in this manner. *See Matter of Kindt*, 542 N.W.2d at 398 ("while Congress felt particular animosity towards prosperous individuals who engaged in this practice [sheltering assets for the potential benefits of heirs], it enacted the 1986 law to prevent *anyone*, regardless of affluence, from gaining [medical assistance] benefits by placing assets into a trust that might eventually fall to the settlor's heirs.") (emphasis in original)[9]

3. Courts in other jurisdictions that have addressed the determination of "available" resources under the MQT statute similarly have held that for purposes of determining Medicaid eligibility, trust assets are available to grantors where the trustee has discretion to use the assets for the beneficiary in circumstances where the beneficiary is not eligible for Medicaid benefits. *Matter of Kindt*, 542 N.W.2d at 399 (assets of MQT available to beneficiary insofar as trustee had discretion to

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law, and thus supports the Supreme Judicial Court's conclusion. *See Helvering v. N.Y. Trust Co.*, 292 U.S. 455, 468-469 (1934) ("Mere change of language does not necessarily indicate intention to change the law. The purpose of the variation may be to clarify what was doubtful and so to safeguard against misapprehension as to existing law.").

[9] The 1986 statute provided that states "may" waive the application of the statute with respect to an individual based on undue hardship, *see* 42 U.S.C. § 1396a(k)(4), but Massachusetts did not adopt such a hardship exception.

distribute trust assets in absence of beneficiary's eligibility for medical assistance benefits); *Williams v. Kansas Dep't of Social & Rehabilitation Servs.*, 258 Kan. at 172-173, 899 P.2d at 460 (trust assets deemed available under MQT statute because trustee had discretion to pay amounts for beneficiary's support in circumstances where beneficiary was ineligible for Medicaid); *Ronney v. Department of Social Servs*, 210 Mich. App. 312 , 321, 532 N.W.2d 910, 914 (1985) (affirming agency's determination that value of MQT was countable asset in determining applicant's eligibility for Medicaid); *Hatcher v. Department of Health & Rehabilitative Servs.*, 545 So. 2d 400, 402 (Fla. Dist. Ct. App. 1989) (assets in MQT were properly considered for purposes of determining Medicaid eligibility notwithstanding trust purpose of supplementing public assistance); *Forsyth v. Rowe*, 1995 WL 152124 (Conn. Super. 1995) (upon remand from Connecticut Supreme Court, superior court held that entire trust assets were available for purpose of determining Medicaid eligibility, notwithstanding trust language providing that trust be used only to supplement public benefits).

CONCLUSION

For the foregoing reasons, the Commissioner respectfully requests that the Court deny the petition for writ of certiorari.

Respectfully submitted,

BRUCE M. BULLEN,
COMMISSIONER OF THE
DIVISION OF MEDICAL
ASSISTANCE,

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Dated: December 5, 1996

APPENDIX TO BRIEF IN OPPOSITION

North Chelmsford Trust, Article 4

ARTICLE FOUR

TERMINATION OF TRUST

Upon the death of the Primary Beneficiary, if termination of this Trust has not previously occurred, this Trust shall terminate, and the Trustee shall pay the reasonable funeral and burial expenses of the Primary Beneficiary, if they have not otherwise been provided for, and shall distribute the balance of such property to such person or persons in such amounts and manner as the Primary Beneficiary may appoint by her will, making specific reference to the power contained in this instrument.

To the extent that the Primary Beneficiary fails to exercise this power of appointment, the Trustee shall distribute such property to those persons who would inherit the Primary Beneficiary's property if he or she had died intestate, domiciled in Massachusetts, free of all debts, and possessed only of such unappointed Trust property.

Notwithstanding any other provisions in this Instrument, the Trustee may at any time terminate this Trust whenever he determines that it is not in the Primary Beneficiary's best interests to continue the Trust, whether because it would be uneconomical to so continue or for any other reason. In such event, the Trustee shall distribute the remaining principal and income of the Trust in his discretion to the guardian or conservator legally appointed for the Primary Beneficiary, or if there is no guardian or conservator, to the presiding judge of a probate court with personal jurisdiction over the Primary

Beneficiary, or directly to the Primary Beneficiary.

This Trust shall in no event be terminated at the request of the Primary Beneficiary, but only in the discretion of the Trustee.

Upon the termination of this Trust during the life of the Primary Beneficiary, the Trustee shall notify in writing the Massachusetts Department of Mental Health and the superintendent or director of any facility or program operated by the Department of Mental Health or under its control or supervision in which the Primary Beneficiary then resides or participates.